

Columbia Law School

## Scholarship Archive

---

Faculty Scholarship

Faculty Publications

---

1990

# The Use of Anti-Suit Injunctions in International Litigation

George A. Bermann

Columbia Law School, [gbermann@law.columbia.edu](mailto:gbermann@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [International Law Commons](#), [Jurisdiction Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L. L. 589 (1990).

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/2105](https://scholarship.law.columbia.edu/faculty_scholarship/2105)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [scholarshiparchive@law.columbia.edu](mailto:scholarshiparchive@law.columbia.edu).

# Articles

## The Use of Anti-Suit Injunctions in International Litigation

GEORGE A. BERMANN\*

### I. INTRODUCTION

Of the various forms of provisional relief in the context of international litigation, none has sparked as much interest and controversy as the international anti-suit injunction. In many ways the international anti-suit injunction, an instrument by which a court of one jurisdiction seeks to restrain the conduct of litigation in another jurisdiction, resembles more conventional forms of international provisional relief such as the foreign attachment or preliminary injunction. Like them, the anti-suit injunction affords courts an important opportunity to affect the course and significance of litigation abroad. However, such intervention strongly implies—and often actually creates—jurisdictional conflict rather than the jurisdictional cooperation often associated with the notion of provisional relief in domestic and international litigation alike. That anti-suit injunctions are addressed to private persons within the jurisdiction of the enjoining court (operating against them in personam), rather than directly to the foreign court whose proceedings are at issue, does not substantially lessen the element of conflict.<sup>1</sup>

---

\* Professor of Law, Columbia University School of Law. This article is the development of a talk delivered at a panel discussion sponsored by the American Foreign Law Association on the occasion of the International Law Association's 1989 annual International Law Weekend held at the Association of the Bar of the City of New York.

1. American courts have generally refused to distinguish between addressing an injunction to parties before a court and addressing an injunction to the court itself. *Donovan v. Dallas*, 377 U.S. 408, 413 (1964); *Central National Bank of Boston v. Stevens*, 169 U.S. 432, 460 (1898); *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984); *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981), *cert. denied*, 457 U.S.

The sensitivity of the anti-suit injunction in international practice arises more out of its anti-suit than its injunctive aspect. Generally speaking, American courts do not consider it improper to order a person subject to their personal jurisdiction to perform, or refrain from performing, a specified act outside the forum, provided they have a sufficient interest in the performance of that act and intervention is warranted. In certain settings, to be sure, the issuance of international injunctive relief by American courts has generated particularly strong protest by foreign governments and by the private interests adversely affected. One such setting is the order to produce evidence located abroad for use in American litigation, a matter that remains controversial despite an international treaty<sup>2</sup> and a recent Supreme Court ruling on the subject.<sup>3</sup> Another much-criticized use of the international injunction is the order to cease certain overseas practices that, while lawful where performed, are deemed to affect adversely important American regulatory interests.<sup>4</sup>

Nevertheless, there is something singularly problematic about injunctions prohibiting the commencement or continuation of foreign judicial proceedings. Although the *Laker* litigation of several years ago brought the international anti-suit injunction into view as never before,<sup>5</sup> this instrument's scope of application and its capacity for mischief in international litigation are still greatly underestimated. This article seeks to put the problem in new perspective by viewing the international anti-suit injunction against the background of analogous interstate practice and explicitly considering the relevant policy differences raised by the international element. Accordingly, upon relating

---

1105 (1982); *O'Hare Int'l Bank v. Lambert*, 459 F.2d 328, 331 (10th Cir. 1972). For another view drawing such a distinction, see *Cole v. Cunningham*, 133 U.S. 107, 121 (1890); *Natalbany Lumber Co. v. McGraw*, 188 La. 863, 871, 178 So. 377, 379 (1938); *Labak v. Graznar*, 54 Ohio App. 191, 193-94, 6 N.E.2d 790, 791 (1935); *State ex rel. R.R. v. Nortoni*, 331 Mo. 764, 767, 55 S.W.2d 272, 273 (1932); Note, *Enjoining Suits in Foreign Jurisdictions*, 17 COLUM. L. REV. 328 (1917).

2. Hague Convention on the Taking of Evidence in Civil or Commercial Matters, 1973, 23 U.S.T. 2555, T.I.A.S. No. 744.

3. *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987). See Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision*, 63 TUL. L. REV. 525 (1989).

4. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 415, comment a (1987).

5. See, e.g., Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 AM. J. COMP. L. 487 (1987); Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039 (1985) [hereinafter Note, *Antisuit Injunctions*]; Note, *Injunctions Against the Prosecution of Litigation Abroad: Towards a Transnational Approach*, 37 STAN. L. REV. 155 (1984) [hereinafter Note, *Injunctions Against the Prosecution of Litigation Abroad*]. Most American commentators have been highly critical, on comity grounds, of the international anti-suit injunction.

the *Laker* case as a paradigm of the international anti-suit injunction (part II), it looks to the domestic cases, and the principles of constitutional and judicial policy that appear to govern them, as background against which to measure the problem in its international guise (part III). After considering the international anti-suit injunction in both constitutional and non-constitutional light (parts IV and V), the balance of the article (part VI) differentiates among the three principal objectives served by the anti-suit injunction in the international context and suggests the outlines of a judicial policy best suited to each.

## II. THE *LAKER* LITIGATION

Laker Airways was a small British airline that in the 1970's had introduced a low-fare transatlantic charter service, acquiring at the height of its business one-seventh of that market. Not long thereafter, however, price competition from the more established airlines, coupled with Laker's difficulties in financing its operations, forced the company into liquidation. Through its liquidators, Laker instituted an antitrust action in federal district court in Washington, D.C. against several international airlines, its aircraft supplier (McDonnell Douglas) and the supplier's financial affiliate (McDonnell Douglas Finance Corporation). Laker charged that the airline defendants had conducted a campaign of predatory pricing designed to put Laker out of business and, to that end, had enlisted the cooperation of McDonnell Douglas and the McDonnell Douglas Finance Corporation, as well as Laker's own lender, Midland Bank, which was not sued. Laker sought treble damages in excess of one billion dollars.<sup>6</sup>

Even before having been brought into the litigation, Midland Bank took the precaution of applying to the English High Court for an anti-suit injunction barring Laker from joining it as a defendant. After the bank obtained the relief sought,<sup>7</sup> several of the airline defendants applied in the same court for still fuller relief. They sought, in addition to an injunction halting the American proceedings pending against them, both a declaration that they had not engaged in any unlawful conspiracy and a "counter-anti-suit injunction," an

---

6. The American litigation is reported in the following decisions: *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Laker Airways v. Pan Am. World Airways*, 604 F. Supp. 280 (D.D.C. 1984); *Laker Airways v. Pan Am. World Airways*, 596 F. Supp. 202 (D.D.C. 1984); *Laker Airways v. Pan Am. World Airways*, 577 F. Supp. 348 (D.D.C. 1983); *Laker Airways v. Pan Am. World Airways*, 568 F. Supp. 811 (D.D.C. 1983); *Laker Airways v. Pan Am. World Airways*, 559 F. Supp. 1124 (D.D.C. 1983).

7. The circumstances of Midland's successful application in the High Court are recounted in *Midland Bank plc. v. Laker Airways Ltd.*, [1986] 1 All E.R. 526, 528, 530 (Lawton, L.J.) (C.A. 1985).

order barring Laker from seeking an anti-suit injunction in the United States directed at the English proceedings. Though the English High Court temporarily granted the injunctions, it later denied permanent relief.<sup>8</sup> On appeal, injunctive relief was awarded by the Court of Appeal,<sup>9</sup> only to be later vacated on further appeal by the House of Lords.<sup>10</sup>

While the British anti-suit litigation was still in its early stages, Laker sought an order from the American court barring the other defendants from obtaining anti-suit injunctions or counter-anti-suit injunctions in England. The application was successful,<sup>11</sup> and the district court's grant of relief was sustained on appeal.<sup>12</sup> It was only after the Courts of Appeal of the two jurisdictions had reached an apparent stalemate<sup>13</sup> that the House of Lords issued its order vacating the English injunction. According to the Lords, the business conduct of the airlines reasonably subjected them to the prescriptive antitrust jurisdiction of the United States, and Laker's American lawsuit could not therefore be deemed an "unconscionable" exercise in extraterritoriality, as the English Court of Appeal in ordering the injunctive relief had found it to be.<sup>14</sup> Eventually the antitrust suit was settled, with Sir Freddie Laker taking home a substantial sum of money.<sup>15</sup>

Although the particular jurisdictional confrontation in *Laker*

---

8. *British Airways Bd. v. Laker Airways*, [1984] 1 Q.B. 142 (C.A. 1983).

9. *Id.* at 169. The Court of Appeal explained its reversal of the High Court ruling as required by an intervening order of the British Secretary of State for Trade and Industry prohibiting the production of documents for use in the American action. That order was issued pursuant to the British blocking statute, the Protection of Trading Interests Act of 1980, ch. 11, and was cited by the Court of Appeal as disabling the applicants from adequately defending themselves in the American action. See *Protection of Trading Interests (U.S. Antitrust Measures) Order 1983* (June 27, 1983), reproduced in *British Airways Bd. v. Laker Airways*, [1984] 1 Q.B. 169, 195 (C.A. 1983).

10. *British Airways Bd. v. Laker Airways*, [1985] A.C. 58 (1984).

11. 559 F. Supp. 1124 (D.D.C. 1983).

12. 731 F.2d 909 (D.C. Cir. 1984).

13. When it appeared that an impasse had been reached and that the British injunction might stand, the District Court appointed an *amicus curiae* specifically to advise the court on how to proceed. 577 F. Supp. 348, 355-56 (D.D.C. 1983). For the report of the *amicus curiae*, see Pollak, *Report of Amicus Curiae*, 23 INT'L LEG. MAT. 598 (1984). The report suggested that a person outside the jurisdiction of the English courts and immune from any anti-suit injunction the courts might issue be appointed trustee or receiver to continue the action on Laker's behalf.

14. *British Airways Bd. v. Laker Airways*, [1985] A.C. 58, 84 (Diplock, L. J.), 95-96 (Scarman, L. J.) (1984). The Lords not only vacated the injunction, but also held that the English courts are without jurisdiction to resolve questions of liability under American anti-trust law.

15. *Laker Suit Settled for \$60 Million*, Wash. Post, Oct. 2, 1985, at C3, col. 4. Sir Freddie Laker, founder of the airline, subsequently retired from the airline business, setting up an aviation consulting practice in the Bahamas. *Freddie Laker at Slower Speed*, New York Times, Oct. 4, 1987, § 3, at 12, col. 3.

was resolved,<sup>16</sup> the prospects for future confrontation were not. Midland Bank, whose anti-suit injunction against Laker had been vacated by the High Court in the wake of the House of Lords ruling in *Laker*,<sup>17</sup> subsequently succeeded in having the injunction reinstated by the English Court of Appeal on the ground that pursuit of an American antitrust action against it would be "unconscionable."<sup>18</sup> Midland in fact never became a defendant in the American action. Although one cannot be entirely sure what role the British order played in shielding Midland from suit in the United States, the ruling showed that the prospect of further interjurisdictional impasse was not to be dismissed. All in all, the protracted *Laker* litigation left observers puzzled and disturbed by the vast anti-suit and counter-anti-suit injunction possibilities.

### III. THE INTERSTATE BACKGROUND OF THE ANTI-SUIT INJUNCTION

It is understandably tempting to begin any analysis of the anti-suit injunction with cases like *Laker* that place the practice in its high-stakes transnational setting. But though such cases doubtless have given the problem much of its currency, the fact remains that interjurisdictional injunctions were not invented for international cases alone. In fact, until relatively recently, American courts rarely exercised the power to restrain proceedings in the courts of foreign nations. On the other hand, the anti-suit injunction has long been a feature of what might be called sister-state interjurisdictional practice.

The anti-suit injunction has deep roots in English law.<sup>19</sup> Traceable at least to fifteenth-century England, the remedy first appeared in the form of a writ of prohibition by the common law courts to the ecclesiastical courts to prevent their expansive jurisdictional assertions.<sup>20</sup> Later, the Court of Chancery invoked the remedy as a means

---

16. Even following the House of Lords decision, the district court granted a preliminary injunction barring the airlines from again asking the British courts to interfere with the American proceedings. *Laker Airways v. Pan Am. World Airways*, 596 F. Supp. 202, 204 (D.D.C. 1984). However, the court later declined to restrain the airlines from resorting to the British executive and legislative authorities. *Laker Airways v. Pan Am. World Airways*, 604 F. Supp. 280, 294 (D.D.C. 1984).

17. On the strength of *Laker*, Judge Leggatt discharged the anti-suit injunction and struck the bank's claim for a declaration of non-liability under American law.

18. [1986] 1 All E.R. 526 (C.A.). Although it reinstated the anti-suit injunction, the Court of Appeal nevertheless dismissed Midland's request for a declaration of non-liability under English law.

19. See generally Hartley, *supra* note 5; Note, *supra* note 1.

20. Lord Coke, as Chief Justice of the Court of Common Pleas, strongly defended the right of the common law courts to address writs of prohibition to the ecclesiastical courts. See, e.g., *Langdale's Case*, 77 Eng. Rep. 1338 (K.B. 1609). See also *Fuller's Case*, 77 Eng. Rep.

of preventing a party from bringing suit in the common law courts under circumstances in which doing so would be considered contrary to good conscience.<sup>21</sup> Though initially directed at proceedings in other English courts, the anti-suit injunction eventually was extended to proceedings in foreign countries. It is in that very different arena that the remedy is now most commonly deployed by English courts. Considering the anti-suit injunction's origins and evolution in Great Britain, the *Laker* case was thus an especially appropriate occasion for bringing renewed attention to the remedy in the United States.

### A. *The Domestic Anti-Suit Injunction Cases*

As mentioned, anti-suit injunctions have long been an accepted feature of sister-state practice,<sup>22</sup> and their issuance or nonissuance has given rise to abundant case law. Upon examination, the sister-state cases involving anti-suit injunctions show three striking features. First, issuance of such an injunction appears to require rather little by way of legal preconditions. Legally, the stage is set when parallel proceedings involving the same parties and the same issues are pending or contemplated in different fora, and the party seeking relief from the out-of-state action can demonstrate that serious and irreparable harm would actually flow from its maintenance.<sup>23</sup> Second, notwithstanding the frequent admonition that courts should not lightly interfere with judicial proceedings in the courts of a sister state,<sup>24</sup> over the years a

---

1322, 1323 (K.B. 1607). See generally Dumbauld, *Judicial Interference with Litigation in Other Courts*, 74 DICK. L. REV. 369, 375-78 (1969).

21. See Hartley, *supra* note 5, at 489.

22. Pound said of the interjurisdictional anti-suit injunction: "Undoubtedly a state may coerce its citizens not to sue abroad. It does not follow, however, that its courts of equity . . . ought to exercise such jurisdiction in every case where it exists. We have to ask: What are the legal rights of the plaintiff in equity, defendant abroad, and are the legal remedies which are open to him adequate to maintain those rights? We have then to ask, is the injustice and hardship upon the plaintiff such as to make it expedient for equity to act, in view of the delicate considerations involved in interference with legal proceedings in other states?" Pound, *The Progress of the Law*, 33 HARV. L. REV. 420, 426 (1920).

23. Some courts have required that the allegedly offensive foreign action already have been instituted in order for the injunctive claim to be ripe. See Note, *When Courts of Equity Will Enjoin Foreign Suits*, 27 IOWA L. REV. 76, 85 (1942).

24. E.g., *McWhorter v. Williams*, 228 Ala. 632, 633, 155 So. 309, 310 (1934); *Johnson v. Johnson*, 146 Misc. 93, 95, 261 N.Y. Supp. 523, 526 (Sup. Ct. 1933); *Delaware L. & W.R.R. v. Ashelman*, 300 Pa. 291, 295, 150 A. 475, 476 (1930); *Reed's Adm'x v. Illinois Cent. R.R.*, 182 Ky. 455, 465, 206 S.W. 794, 798 (1918); *J.W. Wells Lumber Co. v. Menominee River Boom Co.*, 203 Mich. 14, 30, 168 N.W. 1011, 1016 (1918); *American Express Co. v. Fox*, 135 Tenn. 489, 492, 187 S.W. 1117, 1118 (1916); *Wade v. Crump*, 173 S.W. 538, 539 (Tex. Civ. App. 1915); *United Board & Carton Corp. v. Beuerlein*, 35 N.J. 343, 173 A.2d 225 (1961). Countless such decisions hold that convenience or preference to be sued in a given jurisdiction will not ordinarily enable the defendant to enjoin the plaintiff from proceeding in others. Note, *supra* note 1, at 329.

large number of anti-suit injunctions have been directed against proceedings in sister-state courts.<sup>25</sup> Third, the sister-state cases reveal a considerable variety in the uses to which injunctive relief of this sort is put and in the special circumstances said to justify them. Basically, anti-suit injunctions have been ordered or affirmed when the enjoining jurisdiction considers the out-of-state action to be (1) highly inconvenient, vexatious or oppressive (generally to a local party), (2) in violation of a prior and independent obligation not to sue, or (3) a threat to the enjoining court's own jurisdiction or otherwise contrary to local public policy.<sup>26</sup> Under these broad rubrics, American courts have offered equitable relief in the form of anti-suit injunctions in a wide range of different situations.

Perhaps the most frequent reason courts give for enjoining the prosecution of a suit in a sister-state court is the desire to protect local residents from the hardship of inconvenient, vexatious or oppressive litigation. That a party would rather not be sued, or believes it has a meritorious defense, should not of course by itself entitle it to have the proceedings effectively enjoined by a different court. Similarly, that a party would prefer suit to take place, if at all, in a different court does not without more entitle it to have that court effectively oust the forum of jurisdiction. Nevertheless, parties have been remarkably successful in persuading judges to restrain proceedings in sister-state courts by showing that under the circumstances those proceedings were unreasonably inconvenient, vexatious or oppressive.<sup>27</sup> The sister-state cases involving disagreement over the fairness and reasonableness of the plaintiff's choice of forum present the jurisdictional conflict in its plainest terms. When either the enjoining or targeted jurisdiction is a federal court, however, the rules governing the propriety of interjurisdictional anti-suit injunctions obey somewhat different principles and assume additional refinements which exceed the scope of this inquiry.<sup>28</sup>

Quite clearly, what one party considers resort to legitimate

---

25. *Cole v. Cunningham*, 133 U.S. 107 (1890); *Baltimore & Ohio Ry. v. Clem*, 36 F. Supp. 703 (N.D. W. Va. 1941); *Pitcairn v. Drummond*, 216 Ind. 54, 23 N.E.2d 21 (1939); *Oates v. Morningside Coll.*, 217 Iowa 1059, 252 N.W. 783 (1934); *Boston & M.R.R. v. Whitehead*, 307 Mass. 106, 29 N.E.2d 916 (1940); *Marquis v. Marquis*, 121 N.J. Eq. 288, 189 A. 388 (Ct. Errors and App. 1937); *Labak v. Graznar*, 54 Ohio App. 191, 6 N.E.2d 790 (1935).

26. See generally Note, *supra* note 23, at 86-104.

27. E.g., *Commercial Acetylene Co. v. Avery Lighting Co.*, 152 F. 642 (1906), *aff'd*, 159 F. 935 (7th Cir. 1908); *Gordon v. Munn*, 81 Kan. 537, 106 P. 286 (1910); *Locomobile Co. v. American Bridge Co.*, 80 App. Div. 44, 80 N.Y. Supp. 288 (1903). See generally Note, *supra* note 23, at 83-84.

28. See generally Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471 (1965).



litigation advantages of an out-of-state forum may strike the other as an exercise in inconvenience, vexatiousness and oppression. Equally clear, while courts have developed some useful rules for deciding when recourse to a sister-state court is or is not abusive,<sup>29</sup> none has devised a test that would neatly distinguish the two situations in all cases. Many courts, particularly in the older cases, appear to be on the lookout for evidence of fraud or collusion in resort to the chosen forum,<sup>30</sup> or for an actual intent to cause undue hardship to the defendant,<sup>31</sup> but the subjectivity of these conditions makes the inquiry difficult. In addition, these labels have a highly conclusory quality and do not seem better able than any other factor to explain the results.

A second category of cases in which courts have sought to restrain judicial proceedings in sister states is characterized by the existence of some prior and independent obligation not to sue of which the sister-state proceedings allegedly represent a breach. This is a category of cases that, while not figuring prominently in the sister-state context, assumes greater proportions in the international cases.<sup>32</sup> The difference may be owed to an expectation on the part of defendants in state courts, not shared by defendants in foreign country courts, that the forum can be relied upon with reasonable promptness and objectivity to give effect to the obligation not to sue, and that another court's intervention is simply not necessary.<sup>33</sup> It may be due in part, too, to the greater incidence of arbitration and choice-of-forum clauses in international transactions.

Least well defined is the class of cases in which the enjoining court regards the out-of-state proceedings as a threat to its own jurisdiction or to some other paramount consideration of public policy.

---

29. Courts have said that the availability in the sister-state court selected of more advantageous rules of evidence or of a more favorable body of law on the merits of a dispute is not a proper ground for enjoining conduct of the foreign proceedings. *Edgell v. Clarke*, 19 App. Div. 199, 45 N.Y. Supp. 979 (1897); *Carson v. Durham*, 149 Mass. 52, 20 N.E. 312 (1889).

30. Fraud has been found when the entire lawsuit appears to be part of a scheme to defraud and, more narrowly, when fraud has been practiced in order to come within the subject matter or personal jurisdiction of the court. For a discussion and illustrations, see Note, *supra* note 23, at 87-91.

31. Generally speaking, the party seeking injunctive relief must demonstrate that institution of the principal proceedings abroad was motivated by a desire to injure the defendant rather than to obtain a legitimate litigation advantage. *Paramount Pictures, Inc. v. Blumenthal*, 256 App. Div. 756, 760, 11 N.Y.S. 2d 768, 772 (1939); *Bankers Life Co. v. Loring*, 217 Iowa 534, 544, 250 N.W. 8, 13 (1933).

32. See *infra* notes 119-27, and accompanying text.

33. Defendants probably assume, and rightly so, that state courts may not be as receptive to the idea that litigation pending before them is so inconvenient, vexatious or oppressive to the defendant as to require dismissal on *forum non conveniens* or some other discretionary ground.

The older cases of this sort are populated with gambling statutes, grounds for divorce, policies against obtaining preferences from an insolvent debtor, garnishment of exempt wages and the administration of decedents' estates.<sup>34</sup> The public policy category also, and more questionably, includes claims that the out-of-state forum simply will apply to a given dispute a body of law that is substantially less favorable to the defendant in that action than the law that would be applied by the court asked to intervene.<sup>35</sup> American courts have also wrestled with the claim that certain statutory causes of action may only be brought in the jurisdiction that created them and that an injunction may therefore issue to enjoin their prosecution elsewhere.<sup>36</sup> They may react similarly to the assertion by a sister-state court of personal jurisdiction over one of their domiciliaries under circumstances suggesting a violation of due process.<sup>37</sup> A related claim, rarely heard in the sister-state context but not at all unlikely to surface in the international setting, is that the out-of-state tribunal is not willing or able to afford a fair hearing or to accord full and adequate relief.<sup>38</sup>

Although the typology set out covers virtually all cases in which anti-suit injunctions may plausibly be sought, some cases do not fall neatly into any one category to the exclusion of the others. At the

---

34. *E.g.*, *Bigelow v. Old Dominion Copper Min. & Smelting Co.*, 74 N.J. Eq. 457, 481, 71 A. 153, 163 (Prerog. Ct. 1908); *Kelly v. Siefert*, 71 Mo. App. 143, 147 (1897); *Sandage v. Studebaker Co.*, 142 Ind. 148, 153, 41 N.E. 380, 381 (1895); *Keyser v. Rice*, 47 Md. 203, 206 (1877); *Wierse v. Thomas*, 145 N.C. 261, 264, 59 S.E. 58, 59 (1907). *See generally* Note, *supra* note 23, at 92-94.

35. Note, *supra* note 23, at 94-95.

36. *Id.* However, the Supreme Court has held that "a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction." Accordingly, a state need not give full faith and credit to a provision of law of another state creating a transitory cause of action that purports to bar the courts of any other state from entertaining it. *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965). Nevertheless, that a state need not respect restrictions of venue built into sister-state transitory causes of action will not necessarily prevent the state enacting those restrictions from enjoining persons within its jurisdiction from bringing those causes of action elsewhere. *See Wabash Ry. v. Peterson*, 187 Iowa 1331, 175 N.W. 523 (1919). For the view that restrictive venue statutes by themselves and without special circumstances do not justify interference with sister-state proceedings, see Note, *supra* note 23, at 98-99.

37. Such a claim would not ordinarily justify issuance of an anti-suit injunction because the forum, particularly through its appellate levels, is capable of correcting the error if any and obligated to do so. The United States Supreme Court is also a potential appellate forum on the jurisdictional issue. On essentially the same logic, the Supreme Court has held that parties that have had an opportunity to challenge the jurisdiction of the rendering court in that court and on appeal, may not ask a sister-state court to deny recognition to the resulting judgment on grounds of lack of jurisdiction. *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522, 524-525 (1931). *Cf. Trainies v. Sunshine Min. Co.*, 308 U.S. 66 (1939).

38. For such a claim in the sister-state context, see *Monumental Savings Ass'n v. Fentress*, 125 F. 812 (C.C.E.D. Va. 1903).

same time, some cases raise distinctive issues that the categories do not adequately capture. The case of *Stevens v. Frick*<sup>39</sup> provides a good example. The plaintiff there had brought suit in a Pennsylvania state court against a well-known historian for the alleged defamation in one of his books on Pennsylvania history of her father, a wealthy nineteenth-century industrialist.<sup>40</sup> This suit for a permanent injunction barring the book's sale and distribution eventually failed on several grounds.<sup>41</sup> Before decision, however, and at the urging of the American Historical Association and Organization of American Historians, the defendant filed suit in federal court seeking to bar the plaintiff from continuing the defamation action on the ground that it chilled the exercise of constitutionally protected federal rights of free expression. Although that action raised serious issues, it ultimately failed both in district court and on appeal, on account of the courts' reluctance, except in highly special circumstances, to interfere with proceedings in another jurisdiction.<sup>42</sup> The interest of the case, however, lies in its illustration of all three anti-suit injunction grounds. The defendant in the defamation suit described the action as inconvenient and vexatious; he portrayed the plaintiff (and the state judge) as under a prior and overriding obligation to respect his First Amendment rights; and he asserted the strong public interest of the court (sitting in New York, the publisher's principal place of business) in not permitting the defamation action to proceed.<sup>43</sup> Despite the

---

39. 259 F. Supp. 654 (S.D.N.Y. 1966), *aff'd*, 372 F. 2d 378 (2d Cir.), *cert. denied*, 387 U.S. 920 (1967).

40. The book, *Pennsylvania: Birthplace of the Nation*, allegedly portrayed the plaintiff's father falsely as an enemy of labor.

41. The state court ruled for the defendant on several grounds, including the non-survival of defamation claims and the non-applicability of Pennsylvania's statute on the survival of actions, and the essential truth of the representations. *Frick v. Stevens*, 43 Pa. D. & C. 2d 6, 43, 47 (C.P. Cumb. Co. 1967).

42. *Stevens v. Frick*, 259 F. Supp. 654 (S.D.N.Y. 1966), *aff'd*, 372 F.2d 378 (2d Cir.), *cert. denied*, 387 U.S. 920 (1967). The state court decision in favor of the defendant was rendered three days after the Supreme Court's denial of *certiorari*.

The outcome was doubtless also influenced by the federal court's special reluctance to interfere with a state court proceeding. *Stevens v. Frick*, 372 F. 2d 378, 382 (2d Cir. 1967), *aff'g* *Stevens v. Frick*, 259 F. Supp. 654, 657 (S.D.N.Y. 1966).

43. For an interesting discussion of the case, see Dumbauld, *supra* note 20.

A very different example of a claim to injunctive relief based on multiple considerations is *Simon v. Southern Ry.*, 236 U.S. 115, 122 (1915), in which the absence of personal jurisdiction of the court over the defendant was found to justify a different court in restraining the proceedings. The absence of jurisdiction could be said to render the proceedings (1) inconvenient and vexatious, (2) violative of an obligation not to bring suit under circumstances suggesting a lack of due process, and (3) contrary to an important policy of the enjoining court in protecting its residents from unreasonable assertions of personal jurisdiction.

Given the nature of the objection to suit in *Simon*—violation of federal due process standards—the intervention does not seem warranted. The proper remedy is appeal within the

difficulty of capturing the range and richness of requests for injunctive relief, the three categories nevertheless provide a framework for understanding the role of the anti-suit injunction in the sister-state context and for evaluating its use in the small but growing number of international cases.

*B. "Full Faith and Credit" and the Anti-Suit Injunction*

Given its expansive potential for interference with judicial proceedings in sister-state courts, the anti-suit injunction would seem to raise constitutional as well as policy problems. The Full Faith and Credit Clause of the United States Constitution requires by its terms that "Full Faith and Credit shall be given in each State to the . . . Judicial Proceedings of every other State."<sup>44</sup> Accordingly, litigants contesting the propriety of out-of-state anti-suit injunctions, whether on general principles or as applied to specific circumstances, have occasionally raised constitutional objections based on that Clause.

Curiously, although sister-state anti-suit injunctions plausibly constitute just the sort of denial of full faith and credit to "Judicial Proceedings" in courts of other states that the Clause means to forbid, the Supreme Court has held that the Clause does not pose a bar to their issuance. In *Cole v. Cunningham*,<sup>45</sup> the Court faced a situation in which certain Massachusetts creditors, in anticipation of the insolvency of a Massachusetts debtor, assigned their claims to a New York party who proceeded to attach obligations owed to the Massachusetts debtor by various residents of New York. The debtor's assignee in insolvency, appointed pursuant to a Massachusetts statute, then sought an order from a Massachusetts court enjoining maintenance of the New York action. The court granted the relief sought on the ground that the New York action stood to confer preferred status over the other creditors, both in breach of Massachusetts' overriding interest in having all creditors treated equally as well as in fraud of the Massachusetts statute whose provision for appointment of an assignee in bankruptcy was designed precisely to avoid such a breach.<sup>46</sup>

---

judicial system of the court hearing the principal suit, eventually including the United States Supreme Court.

44. U.S. Const. art. IV, § 1. The clause is implemented by a statute providing that "[s]uch . . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 62 Stat. 947 (1948), 28 U.S.C.A. 1738 (1966).

45. 133 U.S. 107 (1890).

46. For the same result, see *Hazen v. Lydonville Bank*, 70 Vt. 543, 41 A. 1046 (1898); *Dehon v. Foster*, 86 Mass. 545 (1862). In a long line of similar cases, state courts have enjoined residents from garnishing debts or attaching property of other residents in a sister-

When the case reached the Supreme Court, the Court rejected any construction of the Clause that would in principle exclude the traditional power of equity courts to prohibit out-of-state conduct in the form of litigation. "The jurisdiction of the English Court of Chancery to restrain persons within its . . . jurisdiction from doing anything abroad, [including] the institution or the prosecution of an action in a foreign court, is well settled."<sup>47</sup>

If the Court meant not only to allow state courts to issue anti-suit injunctions in appropriate cases, but also to ensure that courts whose proceedings were affected would respect such orders, it would find the results of its jurisprudence disappointing. State courts continue on occasion to hold that sister-state anti-suit injunctions are not entitled to constitutional full faith and credit, and may in appropriate circumstances be disregarded, at least by the court whose proceedings have been restrained.<sup>48</sup> They base that view upon the very theory used to justify the issuance of interjurisdictional injunctions in the first place, namely that the order does not interfere directly with the proceedings of a foreign court but only operates in personam against the party enjoined. The foreign court, released from principles of comity, may accordingly disregard it.<sup>49</sup> However, other courts whose proceedings have been targeted by sister-state anti-suit injunctions have accorded recognition to those decrees, in some instances reinforcing them with their own orders of prohibition and in others simply dismissing the action in question.<sup>50</sup>

---

state jurisdiction, when those debts or property were exempt under the law of the forum and common domicile. *Stewart v. Thomson*, 97 Ky. 575, 31 S.W. 133 (1895); *Allen v. Buchanan*, 97 Ala. 399, 11 So. 777 (1892); *Mumper v. Wilson*, 72 Iowa 163, 33 N.W. 449 (1887); *Zimmerman v. Franke*, 34 Kan. 650, 9 P. 747 (1886); *Keyser v. Rice*, 47 Md. 203 (1877).

47. 133 U.S. at 116-17. Three justices dissented, asserting that any error in the proceedings in the state whose court actions were enjoined was subject to correction on appeal in the courts of that state.

See also *Weaver v. Alabama Great So. R. Co.*, 200 Ala. 432, 76 So. 364 (1917).

48. *E.g.*, *Cunningham v. Cunningham*, 25 Conn. Sup. 221, 200 A. 2d 734 (1964); *James v. Grand Trunk West. R.R.*, 14 Ill. 2d 356, 152 N.E. 2d 858, 867, *cert. denied*, 358 U.S. 915 (1958); *Wells v. Wells*, 230 Ala. 430, 161 So. 794 (1935); *Peterson v. Chicago, B. & Q.R.R.*, 187 Minn. 228, 244 N.W. 823 (1932); *Kepner v. Cleveland, C.C. & St. L. Ry.*, 322 Mo. 299, 15 S.W.2d 825 (1929); *Frye v. Chicago, R.I. & P. Ry.*, 15 Minn. 52, 195 N.W. 629 (1923), *cert. denied*, 263 U.S. 723 (1924); *Lancaster v. Dunn*, 153 La. 15, 95 So. 385 (1922); *Union Pacific R.R. v. Rule*, 155 Minn. 302, 193 N.W. 161 (1923). See also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS*, § 103, comment b (1969).

For a full discussion of the case law, see Note, *Full Faith and Credit to Foreign Injunctions*, 26 U. CHI. L. REV. 633 (1959).

49. *E.g.*, *Wells v. Wells*, 230 Ala. 430, 161 So. 794 (1935); *Lindsey v. Wabash Ry.*, 61 S.W. 2d 369 (Mo. 1933); *Peterson v. Chicago, B. & Q. R.R.*, 187 Minn. 228, 244 N.W. 823 (1932).

50. *E.g.*, *Smith v. Walter E. Heller & Co.*, 82 Cal. App. 3d 259, 271, 147 Cal. Rptr. 1, 8 (1978); *Allen v. Chicago Great Western R.R.*, 239 Ill. App. 38, 44 (1925); *Union Pacific R.R.*

American law provides no satisfactory solution to the problem of non-acquiescence by the courts of one state in the restraint of their proceedings ordered by the courts of another. As best as can be determined, in many cases the ordering of injunctive relief is not in the first instance strongly influenced by the expected reaction of the sister-state jurisdiction.<sup>51</sup> Anticipating a combination of moral and legal bases of compulsion,<sup>52</sup> the court may be led to issue an injunction in what it regards as a proper case irrespective of the cooperation it may expect from the targeted court. This factor, combined with the broad range of grounds for enjoining the conduct of out-of-state litigation—particularly the claimed inconvenience or vexatiousness of the proceedings or their offensiveness to the public policy of the enjoining state—makes interjurisdictional conflict highly likely to follow in the wake of the injunction's issuance.

Should the enjoining court's weapons fail it, and the targeted court decline to dismiss the case or reinforce the injunction with one of its own, the suit in question presumably will proceed to judgment. Although a successful judgment is unlikely to be greeted with hospitality for enforcement purposes in the jurisdiction that unsuccessfully sought to restrain the action, it should be readily enforceable in the jurisdiction where rendered and in virtually all other American jurisdictions in which enforcement might be sought. Apart from the possible imposition of sanctions by the enjoining court for disobedience of its order, the injunction thus will have failed in its essential purpose, unless by chance that court prolongs the contest by enjoining the successful plaintiff from enforcing its judgment in the sister state where rendered,<sup>53</sup> and for some unlikely reason is more successful in securing compliance with that order than it was with its first.

The Full Faith and Credit Clause would seem to have potential application at various points in these scenarios, even assuming it does not bar issuance of a sister-state anti-suit injunction in the first

---

v. Rule, 155 Minn. 302, 306, 193 N.W. 161, 162 (1923) (Holt J., dissenting); *Equitable Life Assurance Soc. v. Gex' Estate*, 184 Miss. 577, 579, 186 So. 659, 663 (1939); *Fisher v. Pacific Mut. Life Ins. Co.*, 112 Miss. 30, 32, 72 So. 846, 848 (1916); *Gilman v. Ketcham*, 84 Wis. 60, 65, 54 N.W. 395, 396 (1893). For a comparable reaction in the state/federal context, see *Blanchard v. Commonwealth Oil Co.*, 294 F.2d 834, 840 (5th Cir. 1961).

51. See, e.g., *Laumeier v. Laumeier*, 308 Mo. 201, 271 S.W. 481 (1925); *Hawley v. State Bank of Chicago*, 134 Ill. App. 96 (1907).

52. Techniques of legal compulsion include contempt sanctions, sequestration of property within the jurisdiction, and injunctions barring vital witnesses over whom the court has jurisdiction from testifying in the out-of-state suit. See generally Note, *supra* note 23, at 79-81.

53. See, e.g., *Vann v. Calcasieu Trust & Sav. Bank*, 204 S.W. 1062 (Tex. Civ. App. 1918); *Weed v. Hunt*, 76 Vt. 212, 56 A. 980 (1904); *Davis v. Cornue*, 151 N.Y. 172, 45 N.E. 449 (1896).

place.<sup>54</sup> A first question is whether the Clause requires acquiescence to the injunctive decree by the targeted court. It would appear not, for not only do the targeted courts regularly disregard such decrees, but those that defer to them sometimes emphasize that they are under no compulsion to do so.<sup>55</sup> A further question is whether the Clause at least prohibits a court from enjoining enforcement by a sister-state court of one of its own judgments, whatever the ground for the injunction, but particularly when based on the refusal of the plaintiff and the court in the sister-state proceedings to defer to the enjoining court's attempt to halt them. No state court faced with that question has viewed the Full Faith and Credit Clause as an obstacle<sup>56</sup> and, oddly, no federal court has evidently been asked to intervene.<sup>57</sup>

Although the sister-state cases have been examined chiefly as background for the international ones, my view is that the Full Faith and Credit Clause has played too little a role in the anti-suit injunction context. It would appear from the wide assortment of challenges to sister-state proceedings that virtually any defense, objection or ground for dismissal—perhaps even a vehement denial of the merits of the claim—could furnish a plausible basis for asking that the proceedings be halted. The spate of suits seeking declarations of nonliability arising out of transactions that are the subject of litigation pending elsewhere, of which *Laker* is only the most celebrated example, amount precisely to an attempt to shift trial of the merits of a case to a different forum and possibly a different law. It is another variation on the theme of preemption and frustration of out-of-state proceedings.<sup>58</sup>

---

54. See notes 44-47 *supra*, and accompanying text.

55. See notes 48-49 *supra*, and cases cited therein. See generally Comment, *Extraterritorial Recognition of Injunctions against Suit*, 39 YALE L.J. 719, 721 (1930).

56. *Weed v. Hunt*, 76 Vt. 212, 56 A. 980 (1904); *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S.W. 728 (1899); *Rogers v. Gwinn*, 21 Iowa 58 (1866); *Payne v. O'Shea*, 84 Mo. 129 (1884); *New York, C. & St. L. R. Co. v. Matzinger*, 136 Ohio 271, 25 N.E.2d 349 (1940); *Brown v. Parker*, 28 Wis. 21 (1871); *In re Kittinger's Estate*, 101 N.Y.S. 844 (1950); *Pearce v. Olney*, 20 Conn. 544 (1850).

Courts have held that the unsuccessful defendant may under proper circumstances obtain an order from a sister-state court restraining enforcement of the judgment even though the defendant made no earlier application to the sister-state court to enjoin the proceedings. *E.g.*, *Gaunt v. Nemours Trading Corp.*, 194 App. Div. 668, 186 N.Y. Supp. 92 (1st Dep't 1921); *Gordon v. Mann*, 81 Kan. 537, 106 P. 286 (1910).

57. Supreme Court and lower federal court opinions do, however, speak expansively of the reach and effect of the Full Faith and Credit Clause. See, *e.g.*, *Roche v. McDonald*, 275 U.S. 449, 451 (1928) ("the . . . clause . . . requires that the judgment of a State court which had jurisdiction of the parties and the subject-matter in suit, shall be given in the courts of every other State the same credit, validity and effect which it has in the State where it was rendered and be equally conclusive upon the merits"). But no case deals specifically with the recognition owed to sister-state anti-suit injunctions.

58. Thus, a firm constitutional stand against the issuance of anti-suit injunctions with

Claims of inconvenience, vexatiousness and oppression are at bottom ones that a sister-state forum itself can consider fairly and responsibly, and ones for which it has adequate grounds at its disposal to consider, such as forum non conveniens and equity-based dismissals. Tort-based damage claims are available for the unconscionable litigation that slips by. As far as prior and independent obligations not to sue are concerned, they ought to be as readily enforceable in the forum where suit has been brought as anywhere else. The public policy claims are hardest, but even many of these—such as the procedural due process and First Amendment cases—deserve and presumably would receive a full and fair hearing in the state where the challenged suit is pending. As to the others, comfort should be taken in the fact that the public policy systems among the states do not widely and regularly diverge and that, in any event, due process now unquestionably places some constraints on the states' freedom of action in matters of choice of law.<sup>59</sup>

This is not to say that states will not continue to differ in matters of public policy and, equally important, in their assessments of the competing jurisdictions' claims to have their policies prevail in any given case. However, some risk of public friction and private disadvantage inheres in any judicial system based on separate, co-equal and largely autonomous state judiciaries. In facing that risk, we should not afford license to the courts of one state to enjoin the conduct of litigation in the courts of another, and then afford license to the targeted state to disregard the injunction and possibly even respond in kind. In most respects, a refusal to recognize or enforce a sister-state judgment is a less drastic and intrusive measure than an attempt to halt sister-state proceedings in their tracks, and yet the Full Faith and Credit Clause has been held to bar a state court from denying effect to a sister-state judgment on public policy grounds, however deeply offensive it may be to policies the court holds dear.<sup>60</sup> Another advantage of introducing the Full Faith and Credit Clause at an early stage in the anti-suit injunction context is avoiding the further damage to that Clause flowing from refusals of the targeted state to respect sister-state injunctions and, what may be worse, from attempts by the

---

respect to sister-state proceedings is logically accompanied by recognition of a rule of *lis pendens*. That rule likewise finds a basis in the Full Faith and Credit Clause. If a *lis pendens* rule risks provoking races to the courthouse, it should at least avoid a more treacherous race to judgment.

59. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

60. *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Hieston v. Nat'l City Bank of Chicago*, 51 App. D.C. 394, 396, 280 F. 525, 528 (1922). See also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS*, § 117 (1971).



enjoining state to forbid the enforcement in a sister-state court of its very own judgments.<sup>61</sup>

#### IV. CONSTITUTIONAL ASPECTS OF THE INTERNATIONAL ANTI-SUIT INJUNCTION

Considering the broad acceptance of the anti-suit injunction in sister-state practice on both policy and constitutional grounds, it is not surprising that the international anti-suit injunction has found similar acceptance. Most courts faced with the question—and they have not been many—claim authority in proper circumstances to enjoin a party within their jurisdiction from pursuing an action in a foreign country court.<sup>62</sup> On the constitutional level, they would appear to be unquestionably right. The Full Faith and Credit Clause does not speak to foreign country proceedings, and even if it did, it is difficult to see why American courts by virtue of that Clause would be under any greater prohibition regarding jurisdictions to which we have no constitutional bond than they are regarding jurisdictions to which we do.

However, if the Full Faith and Credit Clause does not speak to international anti-suit injunctions, other provisions of the Constitution may. Judicial interference with a foreign country's exercise of adjudicatory authority has a potential for embarrassing the political branches of government and disturbing our relations with that country. Admittedly, that concern has not prevented courts from occasionally refusing to enforce a cause of action arising under foreign law,<sup>63</sup> from denying effect on public policy grounds to the otherwise applicable foreign law,<sup>64</sup> or from refusing to recognize or enforce a foreign country judgment.<sup>65</sup> However, all of the latter measures may

---

61. See notes 56-57 *supra* and accompanying text.

62. *E.g.*, *In re Unterweser Reederei, GmbH*, 428 F.2d 888, 890 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom. The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969); *Blanchard v. Commonwealth Oil Co.*, 294 F.2d 834, 841 (5th Cir. 1961); *Philip v. Macri*, 261 F.2d 945, 947 (9th Cir. 1958); *Garpeg, Ltd. v. United States*, 583 F. Supp. 710, 715 (D. Minn. 1982); *Cargill, Inc. v. Hartford Accident & Indem. Co.*, 531 F. Supp. 710, 715 (D. Minn. 1982); *Western Elec. Co. v. Milgo Elec. Corp.*, 450 F. Supp. 835, 837 (S.D. Fla. 1978). See generally Messner, *The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV. 494, 495-96 (1930).

63. *E.g.*, *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904).

64. *E.g.*, *Kristinus v. H. Stern Com. E. Ind. S.A.*, 463 F. Supp. 1263 (S.D.N.Y. 1979). See *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981).

65. *E.g.*, *Hilton v. Guyot*, 159 U.S. 113, 227 (1895); *Koster v. Automark Indus., Inc.*, 640 F.2d 77, 81 (7th Cir. 1981); *In re Davis' Will*, 31 Misc. 2d 270, 272-73, 219 N.Y.S. 2d 533, 536-37 (1961). See also *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981); *Somportex*

be understood as refusals to lend assistance to the enforcement of foreign law or to the realization of a foreign judgment, rather than as positive interferences with foreign judicial process. In fact, the affront that restraints of foreign judicial proceedings are apt to produce suggests that the act of state doctrine would appropriately be applied in these situations. Although I have found no federal case categorically rejecting international anti-suit injunctions on separation of powers grounds, particular circumstances can readily be imagined in which a rejection on those grounds would be appropriate. As a practical matter, however, one would expect constitutional concerns of this nature to enter into consideration indirectly as factors in a court's discretionary decision whether or not to issue or sustain an anti-suit injunction directed at foreign proceedings.

A second constitutional difficulty with the international anti-suit injunction, specifically when deployed by state courts, is its potential for state intrusion into an area of distinctly federal interest. When the Supreme Court invalidated a state statute that denied nonresident aliens the right to inherit real or personal property located in the state unless able to demonstrate that an American in analogous situations could inherit real or personal property located in the decedent's country, it justified the result in terms of the federal government's paramount interest in avoiding embarrassment or conflict in the conduct of its foreign relations.<sup>66</sup> To my knowledge, no court has categorically invoked the federal government's foreign relations power to bar state courts from issuing orders in restraint of foreign judicial proceedings. Interestingly, neither has any federal court to my knowledge suggested that a state court's exercise of injunctive power to restrain foreign judicial proceedings amounts under the circumstances to an infringement of Congress' or the Executive's constitutional authority to conduct the country's foreign relations. However, there are most likely some circumstances in which a court would be justified in so holding. It is even more likely that sensitivity to the impact of an overseas anti-suit injunction on the country's foreign relations from time to time actually induces caution in a state court's willingness to afford this type of relief.

## V. JUDICIAL SELF-RESTRAINT IN THE INTERNATIONAL CASES

The conclusion that emerges from the foregoing analysis is that

---

Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

66. *Zschemig v. Miller*, 389 U.S. 429 (1968). *See also* *Kolovrat v. Oregon*, 366 U.S. 187 (1961).

while principles of federalism and separation of powers do not as such prevent state and federal courts, respectively, from issuing anti-suit injunctions with respect to foreign judicial proceedings, those principles nevertheless properly influence their judgment whether to grant such discretionary relief in any given case. This conclusion nevertheless raises the further question whether American courts as a general rule should show greater or lesser restraint (if not simply the same level of restraint) in exercising their injunctive powers in the international as compared to the sister-state arena.

There are respectable arguments to be made in favor of showing both less restraint and greater restraint in international cases. If one considers the policy reasons most commonly advanced for the issuance of anti-suit injunctions, the international cases, all other things being equal, are more attractive candidates than the domestic ones. At least some of the objectives that the remedy serves<sup>67</sup> would seem as a general matter more compelling in the international context. In addition, one of the principal arguments invoked against anti-suit injunctions—namely that the proper remedy for wrongful litigation is by way of appeal to higher authority within the judicial system where the litigation is taking place<sup>68</sup>—loses a good deal of force when applied to foreign country proceedings. Leaving aside any suspicion of national bias on the part of foreign tribunals, the appellate court abroad may simply endorse the presumably troubling practice or policy of that jurisdiction's lower courts. A sign of the heightened stakes in the international cases is the greater readiness of courts to issue "counter-anti-suit injunctions," whose purpose, as noted,<sup>69</sup> is to prevent the issuance of an anti-suit injunction by a foreign court.<sup>70</sup> Pre-emptive strikes of this sort do not appear to be as common a feature of sister-state practice.

Although anti-suit injunctions find their greatest utility in the international setting, it is also in that setting that they have their greatest capacity for mischief. Not only are foreign relations apt to be more fragile than sister-state relations, but they are also more apt to be disturbed—specifically by the apparent interference of one state's courts in the judicial business of another's. From a more purely

---

67. These objectives, again, are prevention of highly inconvenient or otherwise vexatious litigation, enforcement of a prior obligation not to sue, and preservation of the court's own jurisdiction or vindication of some peculiarly important public policy of the local forum.

68. *Cole v. Cunningham*, 133 U.S. 107, 116-17 (1890).

69. See notes 8-10 *supra* and accompanying text.

70. *E.g.*, *Laker Airways v. Pan Am. World Airways*, 577 F. Supp. 348 (D.D.C. 1983), *aff'd sub nom.*, *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *James v. Grand Trunk W.R.R.*, 14 Ill. 2d 356, 152 N.E.2d 858, *cert. denied*, 358 U.S. 915 (1958).

institutional point of view, the interest of the federal executive in managing the country's foreign affairs also stands to be impaired by efforts of state and federal courts alike to restrain foreign country judicial proceedings. It is on account of these heightened sensitivities that courts admonish with particular emphasis in the international cases that anti-suit injunctions "should be used sparingly"<sup>71</sup> and "only in the most compelling circumstances,"<sup>72</sup> and that considerations of international comity deserve special weight.

An additional factor that favors restraint in the use of injunctive relief against foreign country proceedings is the availability in that arena of weapons not normally available on account of the Full Faith and Credit Clause in the sister-state cases: the nonrecognition and nonenforcement of the resulting judgment. In other words, it may be argued that anti-suit injunctions fill a need in the domestic setting, where judgments virtually command recognition and enforcement, that is not matched in the foreign setting.<sup>73</sup> However, this argument suffers from the fact that nonrecognition and nonenforcement fall short of injunctive relief in several important respects. In the first place, a strategy of disregard of a foreign country judgment does not meet objections that are based on the foreign litigation itself, such as its inconvenience and vexatiousness, its violation of a prior obligation not to sue, and its offense against certain aspects of public policy, as opposed to its outcome. Moreover, the enjoining court may not be the only jurisdiction in which recognition and enforcement of the foreign judgment will be sought and may be had. The judgment may be given effect in the place where rendered or in any number of third countries. Therefore, although the anti-suit injunction has its own weaknesses—notably the ease with which it can be ignored by the court to which it is directed—it also has features that make it a more potent weapon than an essentially defensive refusal to recognize or enforce an objectionable foreign judgment.<sup>74</sup>

---

71. *Seattle Totems Hockey Club v. National Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982); *Philip v. Macri*, 261 F.2d 945, 947 (9th Cir. 1958). See also *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969).

72. *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 n.52 (D.C. Cir. 1984).

73. Most state legislation on the recognition and enforcement of foreign country judgments, and most international agreements on the subject, provide exceptions to the rule of recognition and enforcement when lack of jurisdiction, fraud, basic procedural unfairness or offense to local public policy can be shown.

74. For the contrary view that nonrecognition and nonenforcement of foreign judgments is an adequate weapon, rendering international anti-suit injunctions largely unnecessary, see Note, *Antisuit Injunctions*, *supra* note 5, at 1063, 1068; Note, *Injunctions Against the Prosecution of Litigation Abroad*, *supra* note 5, at 181.

In sum, the international anti-suit injunction cases appear to lend themselves to two contradictory judicial attitudes. On the one hand, they represent situations in which the policy reasons for restraining out-of-state court proceedings have their greatest force, and the chances of self-correction by the jurisdiction whose proceedings are in question are weakest. These considerations counsel against excessive judicial hesitation in use of the interjurisdictional anti-suit injunction. On the other hand, the equitable nature of the remedy renders it an especially appropriate subject of the special consideration and reserve evoked by the notion of international comity. To judge by the nature and strength of reactions provoked by the interjurisdictional anti-suit injunction, the international arena is far more sensitive to this form of perceived judicial overreaching.<sup>75</sup>

The section that follows takes a closer look at each of the three categories of cases associated with the issuance of anti-suit injunctions. Examining the principal international cases, it identifies the factors that properly bear on the wisdom and desirability of restraining foreign proceedings on the particular ground asserted.

## VI. A POLICY ANALYSIS OF THE INTERNATIONAL ANTI-SUIT INJUNCTION

As indicated earlier, courts have directed anti-suit injunctions at proceedings in other jurisdictions in order to achieve one of three broadly stated objectives: the prevention of highly inconvenient or vexatious litigation, the vindication of a prior and independent obligation not to sue, and preservation of the enjoining court's own jurisdiction or other local policy-based need to forestall foreign judicial proceedings. Because the anti-suit injunction instrument serves so broad a range of objectives, the conditions that should be placed on its use understandably vary with the particular objective pursued in any given case. Moreover, as this section demonstrates, the importance of the international, as distinct from the interstate, character of a suit likewise varies according to the category of use to which the instrument is being put.

---

75. The *Laker* case developed into a full-scale diplomatic episode from which even President Reagan and Prime Minister Thatcher were unable to distance themselves. Following international negotiations, President Reagan ordered that a Justice Department grand jury investigation of the conspiracy alleged by *Laker* be terminated. *Jury Probe of Airlines Called Off: Residential Action Seen Bow to Britain in Fare Dispute*, Wash. Post, Nov. 20, 1984, at A1, col. 1. On the other hand, the yearly scores of sister-state anti-suit injunction cases do not appear to have had important political spillover effects for the jurisdictions involved.

### A. Convenience-Based Anti-Suit Injunctions

A first cluster of situations in which anti-suit injunctions have been issued or upheld basically entails claims that judicial orderliness and efficiency will be served by enjoining the conduct of one action in deference to another. For example, a party that has prevailed in litigation may consider having its adversary enjoined from relitigating the same dispute in a foreign court. The foreign court's application of principles of *res judicata* would presumably render unnecessary any further intervention by the rendering court, whether through issuance of an anti-suit injunction or otherwise,<sup>76</sup> though should the judgment be denied *res judicata* effect an injunction may well issue.<sup>77</sup>

#### 1. Lis Pendens, Forum Non Conveniens and the Anti-Suit Injunction

The more likely and difficult scenario is one where a party that has not yet prevailed in its action seeks an anti-suit injunction to prevent or to halt a second suit in a foreign court on essentially the same cause of action,<sup>78</sup> a suit whose object may be little more than a declaration of non-liability on the principal cause of action. Less commonly, a party against whom proceedings are underway in one forum may seek to restrain the plaintiff from bringing suit in another forum on the same or a related cause of action,<sup>79</sup> especially if the first forum has a special interest in the consolidation of all related claims.<sup>80</sup> In

---

76. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230, 235 (1922); *Looney v. Eastern Texas R.R.*, 247 U.S. 214, 221 (1918); *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 203 Mass. 159, 221, 89 N.E. 193, 213 (1909); *Bigelow v. Old Dominion Copper Min. & Smelting Co.*, 74 N.J. Eq. 457, 474, 71 A. 153, 159-60 (1908).

77. *E.g.*, *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939); *Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984); *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971); *Scott v. Hunt Oil*, 398 F.2d 810 (5th Cir. 1968); *Velsicol Chem. Corp. v. Hooker Chem. Corp.*, 230 F. Supp. 998 (N.D. Ill. 1964).

Judge Wilkey, in the *Laker* case, identified as one of the few situations in which the issuance of an anti-suit injunction by an American court was justified the case of a foreign action instituted on a claim that has already gone to judgment in the forum. 731 F.2d at 928. *See also* *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230, 235 (1922); *Looney v. Eastern Texas R.R.*, 247 U.S. 214, 221 (1918); *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 203 Mass. 159, 221, 89 N.E. 193, 213 (1909); *Bigelow v. Old Dominion Copper Min. & Smelting Co.*, 74 N.J. Eq. 457, 474, 71 A. 153, 159-60 (1908).

78. *E.g.*, *Compagnie des Bauxites de Guinee v. Insurance Co. of N. Am.*, 651 F.2d 877 (3d Cir. 1981), *aff'd on other grounds*, 456 U.S. 644 (1982); *Cargill, Inc. v. Hartford Accident & Indem. Co.*, 531 F. Supp. 710 (D. Minn. 1982); *Medtronic Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946 (D. Minn. 1981), *aff'd*, 664 F.2d 660 (8th Cir. 1981).

79. *E.g.*, *Western Elec. Co. v. Milgo Elec. Corp.*, 450 F. Supp. 835 (S.D. Fla. 1978).

80. This interest may be reflected in general rules about compulsory counterclaims or specific policies about the consolidation of claims in particular areas of the law, like bankruptcy.

these situations, recognition of the principle of *lis pendens* by the second court would normally cause the proceeding before it to be suspended until the first action is completed and its outcome entitled to *res judicata* treatment.<sup>81</sup> However, the doctrine of *lis pendens*<sup>82</sup> was originally developed in the interest of judicial orderliness within a single legal system, unitary or federal.<sup>83</sup> A rule according priority to the action first filed makes especially good sense in that setting, given every sovereign's evident interest in regulating parallel proceedings among its courts. Also, the application of *lis pendens* is less likely to defeat overriding concerns of convenience or forum public policy in domestic than in international cases.

Although a number of American courts have applied *lis pendens* thinking to international cases,<sup>84</sup> it is generally agreed that the doctrine as such does not operate in that setting.<sup>85</sup> Instead, courts generally permit parallel proceedings on the same in personam claim to continue in different jurisdictions and eventually proceed to judgment.<sup>86</sup> In fact, it is difficult as a policy matter to conclude that priority in timing should count as anything more than one among many different factors to be considered in the international anti-suit injunction setting. A basically mechanical rule of that sort takes too little account of the conflicting interests and policies likely to be at issue in

---

81. *E.g.*, *Bank Sav. Life Ins. Co. v. Wood*, 122 Kan. 831, 253 P. 431 (1927); *Wade v. Crump*, 173 S.W. 538 (Tex. Civ. App. 1915); *Freick v. Hinkley*, 122 Minn. 24, 141 N.W. 1096 (1913). *But see* notes 85-86 *infra* and accompanying text. For an example of the application of *lis pendens* in an international case, see *Cornfeld v. Investors Overseas Serv., Ltd.*, 471 F. Supp. 1255 (S.D.N.Y. 1979). Unfortunately, the *Restatement of Conflict of Laws* would allow courts even in the sister-state context to entertain an action although an action on the same claim is pending elsewhere. *Restatement (Second) Of Conflict Of Laws*, § 86 (1971). The European Communities' Brussels Convention does, however, adopt a "first-filed rule." Courts must dismiss suits brought on a cause of action already the subject of litigation in another member state court. Where the actions are merely related, dismissal by the second court is discretionary. *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, Sept. 27, 1968, arts. 21-22, 15 O.J. Eur. Comm. (No. L 299) 32 (1972).

82. The *lis pendens* doctrine provides for a court in which a suit has been filed to stay proceedings when an action between the same parties over the same dispute has already been filed and is pending in another court.

83. *Smith v. McIver*, 22 U.S. (9 Wheat.) 532 (1824). In *Smith v. McIver*, Chief Justice Marshall observed that "[i]n all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it." *Id.* at 535. *See also* *Cresta Blanca Wine Co. v. Eastern Wine Corp.*, 143 F.2d 1012, 1014 (2d Cir. 1944).

84. *Medtronic, Inc. v. Catalyst Research Corp.*, 664 F.2d 660, 663 (8th Cir. 1981); *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 n.10 (3d Cir. 1981), *aff'd on other grounds*, 456 U.S. 694 (1982); *Canadian Filters (Harwich) v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969).

85. *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 n.10 (3d Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

86. *See Note, Injunctions Against the Prosecution of Litigation Abroad*, *supra* note 5, at 163.

the international cases. Moreover, the criticism most often leveled at the prior filing rule—that it encourages the proverbial race to the courthouse<sup>87</sup>—seems decidedly more troubling when the race is run across international jurisdictional lines. Indications in any event are that international *lis pendens* is a principle not regularly honored.<sup>88</sup>

Considering the frailty of the notion of international *lis pendens*, the court of pendency of an action simply cannot rely on foreign tribunals subsequently invoked automatically to decline jurisdiction on the ground that suit on a substantially similar cause of action is already pending elsewhere. Experience shows that in those circumstances courts sometimes inquire whether maintenance of parallel proceedings would be so inconvenient or wasteful of judicial resources, or would cause such delay or complexity, as to justify the extraordinary measure of an international anti-suit injunction.<sup>89</sup>

A leading American decision restraining foreign proceedings in the interest of convenience is *Cargill, Inc. v. Hartford Accident & Indemnity Company*.<sup>90</sup> In that case, the plaintiff Cargill sought a five million dollar recovery in federal court in Minnesota from each of two separate insurance companies under policies covering losses resulting from dishonesty on the part of certain employees of plaintiff's English subsidiary.<sup>91</sup> After denying one of the insurance companies' motion for dismissal of the action on *forum non conveniens* grounds, the court entertained Cargill's motion for a preliminary injunction specifically barring the insurance company from continuing an English court action against Cargill. The English court action had been brought on the very same day that Cargill instituted suit in the United States and sought a declaration of non-liability to Cargill.

The federal court issued the specific anti-suit injunction sought. While invoking the familiar caution that relief of that sort should be ordered sparingly, the court concluded that it had both general authority to issue an anti-suit injunction targeting foreign country

---

87. See Note, *Anti-suit Injunctions*, *supra* note 5, at 1042 n.18.

88. See Spiro, *The Defence of Lis Alibi Pendens*, 9 Comp. & Int'l L. Rev. of So. Afr. 89 (1976).

89. *E.g.*, *Seattle Totems Hockey Club v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982); *Compagnie des Bauxites de Guinée v. Insurance Co. of N. Am.*, 651 F.2d 877 (3rd Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982); *American Home Assurance Co. v. Insurance Corp. of Ireland*, 603 F. Supp. 636 (S.D.N.Y. 1984); *Chase Manhattan Bank v. State of Iran*, 484 F. Supp. 832 (S.D.N.Y. 1980). American courts have taken the view that parallel proceedings on the same in personam claim are not as a general principle objectionable and that something more than duplication of effort or needless expenditure of resources must be shown. *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-28 (D.C. Cir. 1984).

90. 531 F. Supp. 710 (D. Minn. 1982).

91. Both the alleged dishonesty and the resulting loss occurred in England.



proceedings and specific warrant to do so under the circumstances. The reasons it gave<sup>92</sup> amounted to a finding that the foreign action would be so inconvenient as to warrant restraint of those proceedings.<sup>93</sup>

The discussion thus far has emphasized judicial orderliness and economy as crucial values in the treatment of parallel litigation, but, as the sister-state cases amply demonstrate, the parties may have more private reasons for seeking injunctive relief. One such private reason, closely linked to considerations of judicial orderliness and economy, is a claim that the foreign suit, whether pending or contemplated, is vexatious or oppressive.<sup>94</sup> The recent appellate decision in *Smith, Kline & French Laboratories v. Bloch*<sup>95</sup> illustrates the claim. Bloch, an English research scientist, brought suit in Pennsylvania against both an English company with which he had a consultancy agreement and its American parent, for breach of that agreement. The English company applied in English court for an anti-suit injunction against Bloch, on the ground that England was the "natural"<sup>96</sup> and convenient forum for the dispute and that Bloch's reasons for choosing the American court included the settlement value of an

---

92. The court concluded that "adjudication of the same issue in two separate actions will result in unnecessary delay, substantial inconvenience and expense to the parties and witnesses, and . . . could result in inconsistent rulings or a race to judgment." 531 F. Supp. at 715.

93. For some courts, the mere prospect of duplicative proceedings justifies issuance of an anti-suit injunction. In *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946 (D. Minn.), *aff'd*, 664 F.2d 660 (8th Cir. 1981), the court enjoined the conduct of overseas litigation even in the absence of "evidence that the foreign suits [were] vexatious or harassing, or that they were brought to evade the protections of American law." *Id.* at 956. See also *In re Unterweser Reederei, GmbH*, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom.* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

94. Of course, it could be that a foreign lawsuit is found oppressive or vexatious without particular regard to the relative convenience of two potential fora. According to Lord Diplock in the *Laker* case, an anti-suit injunction may properly be issued to restrain foreign litigation of "frivolous and vexatious" claims. [1985] A.C. 58, 86 (1984). A plainly meritless action, regardless of where brought, might well meet that test. An American example is the case of *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971). There, a federal district court in Florida enjoined a local real estate broker from pursuing an action in the Bahamas for specific performance of an alleged contract to sell land located in the Bahamas. Though the Bahamas was a perfectly appropriate forum for such a suit, the American court found that the Bahaman action was nonetheless oppressive and deserved to be enjoined because the underlying agreement was one as to which only six of the seven co-owners of the land in question had assented, and was therefore manifestly unenforceable in the Bahaman court.

The *Bethell* case does, however, raise the question whether the enjoining court needs to have a substantial interest in the case in order to justify its intervention. Here, the six co-owners, or their successors, were all Florida residents and the sales agreement with the six was signed in Florida.

95. [1983] 1 W.L.R. 730, [1983] 2 All E.R. 72 (C.A. 1982).

96. On the meaning of the "natural forum" in English law, see notes 107-108 *infra* and accompanying text.

inconvenient forum. Although the applicants failed to have the Pennsylvania action dismissed on forum non conveniens grounds, it did secure from the English court an anti-suit injunction directed at those proceedings. When, as in the *Smith, Kline & French* case, a vexatiousness claim is raised, the public and private interests in convenient litigation overlap substantially, much as they do in the more usual case of motions to dismiss on grounds of forum non conveniens.<sup>97</sup>

## 2. The Dual Aspect of Inconvenience

The inconvenience addressed by anti-suit injunctions has at least two dimensions. One is the inconvenience that inheres in any set of parallel proceedings on the same claim. It is simply not convenient, certainly not from the viewpoint of the administration of justice, to have a single claim adjudicated concurrently in separate fora. As noted,<sup>98</sup> a rule of international *lis pendens*, if observed, would satisfactorily address this species of inconvenience. However, since the second court seized of the case is unlikely to decline jurisdiction on this ground, the first court may be tempted to issue an anti-suit injunction to protect its own jurisdiction.<sup>99</sup> This scenario demonstrates what may be considered the "affirmative" or "offensive" use of the *lis pendens* doctrine. As in *Cargill*, courts affording injunctive relief on this basis are apt to emphasize both the public and private interests in avoiding delay, inconvenience, a race to judgment and the risk of inconsistent rulings.

One good reason for not institutionalizing the anti-suit injunction as an offensive version of the *lis pendens* stay is precisely that the inconvenience inherent in parallel proceedings is unlikely to be the only inconvenience factor of interest. Alongside the advantage of having a claim heard in a single forum lies the advantage of having it heard in the decidedly more convenient of two competing fora if in fact there is one. Although the *Cargill* court did not enter into a comparison of the merits of Minnesota and the United Kingdom as fora for the case, other courts have made a comparative convenience inquiry and have strongly buttressed their efforts to halt the duplicative proceeding with a showing that they also happen to represent the

---

97. For an older case in which an American court addressed both the inconvenience and vexatiousness factors, as well as elements of fraud, in enjoining conduct of foreign country litigation, see *Labak v. Graznar*, 54 Ohio App. 191, 194, 6 N.E.2d 790, 792 (1935).

98. See note 81 *supra* and accompanying text.

99. *Williams v. Payne*, 150 Kan. 462, 94 P. 2d 341 (1939); *Oates v. Morningside College*, 217 Iowa 1059, 252 N.W. 783 (1934); *United Cigarette Mach. Co. v. Wright*, 156 F. 244 (1907); *Gaunt v. Nemours Trading Corp.*, 194 App. Div. 668, 186 N.Y. Supp. 92 (1st Dep't 1921); *Field v. Holbrook*, 3 Abb. Pr. 377 (N.Y. 1856). *Contra Ambursen Constr. Co. v. Northern Constr. Co.*, 140 Ga. 1, 78 S.E. 340 (1913).

decidedly more convenient forum. This branch of the inconvenience analysis may in turn be thought of as the "affirmative" or "offensive" use of the forum non conveniens doctrine.<sup>100</sup>

Considering the important difference between the "defensive" forum non conveniens dismissal and the "offensive" anti-suit injunction, courts should be even more reticent about issuing foreign anti-suit injunctions under the banner of orderliness and convenience than they are about declining to exercise jurisdiction on forum non conveniens grounds. In the ordinary "defensive" posture the court simply stays its own hand, while in the "offensive" posture it seeks indirectly to stay the hand of a foreign court. Accordingly, a court considering issuance of an anti-suit injunction on convenience grounds should be no less demanding, and arguably even more demanding, about the required showing of inconvenience than in ordinary forum non conveniens dismissals. A court certainly ought not to proceed on the assumption that a pending or contemplated foreign action is *ipso facto* a source of inconvenience, delay and risk of inconsistency or race to judgment sufficient to justify issuance of an anti-suit injunction. In fact, it ought not issue an anti-suit injunction simply because it concludes that on balance it, rather than the foreign court, is the more convenient forum. Instead, a threshold requirement of inconvenience should have to be met before courts deploy this particular instrument. In addition, a court before which challenged proceedings are pending should be given the chance to apply its own "defensive" forum non conveniens doctrine, if indeed it has one, before a foreign court asserts the right to call those proceedings vexatious and inconvenient, and seeks to restrain them.<sup>101</sup>

Unfortunately, courts generally have not paid much attention to the question whether a more decisive showing of inconvenience ought to be required in the anti-suit injunction compared to the forum non conveniens context. Some courts virtually exclude the issuance of

---

100. In the sister-state context, cases are legion raising the question whether suit in the chosen forum subjects the defendant to such hardship as to justify the more convenient forum (typically also the defendant's domicile) in restraining the conduct of those proceedings. See Note, *supra* note 23, at 101-104, and cases cited therein.

101. The most recent English decisions have adopted this view. See, for example, *Bank of Tokyo v. Karoon*, [1986] 3 W.L.R. 414, 431, [1986] 3 All E.R. 468, 486 (C.A.); *Metall and Rohstoff A.G. v. ACLI Metals (London) Ltd.*, [1984] 1 Lloyd's L. Rep. 598, 609 (C.A.). An important proviso is that the court where the suit is pending can be expected to deal in a fair and unbiased way with the claim that the suit is highly vexatious or inconvenient. See Hartley, *supra* note 5, at 509 n.98, citing *Carvalho v. Hull, Blyth (Angola) Ltd.*, [1979] 1 W.L.R. 1228 (C.A.).

For an American court endorsement of the practice, see *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577 (1st Cir. 1969). See generally, Note, *Injunctions Against the Prosecution of Litigation Abroad*, *supra* note 5, at 178-79.

anti-suit injunctions altogether when based on arguments of convenience. In their view, courts should tolerate the conduct in different jurisdictions of parallel proceedings on the same in personam claim. The risk of inconsistent rulings as such is apparently met by the assumption, which may not always be founded, that as soon as one case goes to judgment, the outcome of the other will be dictated by operation of *res judicata*. The other inconveniences of parallel litigation—duplication of effort, waste of resources, burdensomeness of litigation in the less convenient forum, and the costs of the proverbial race to judgment—are largely to be disregarded as grounds for restraining the conduct of foreign judicial proceedings.<sup>102</sup> Most courts, however, seem to suppose that severe inconvenience may in itself justify the issuance of an international anti-suit injunction,<sup>103</sup> and they in effect treat the test for issuance of anti-suit injunctions, when based on considerations of convenience, as essentially the same as for dismissal of a local action on *forum non conveniens* grounds.

### 3. The British Approach to Convenience-Based Injunctions

Modern usage of anti-suit injunctions in Britain basically follows the latter pattern. The rule, as restated by the House of Lords in 1981, is that if a party demonstrates that England would be a substantially more convenient forum for litigation than a foreign jurisdiction, and that the actual or potential plaintiff in the foreign court would not lose a legitimate advantage by having the case heard in England, then an English court would be justified in enjoining the pending or prospective foreign proceedings.<sup>104</sup> The case in which the House of

---

102. See e.g., *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-28 (D.C. Cir. 1984); *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161 (10th Cir.), *cert. denied*, 46 U.S. 1007 (1982); *Gannon v. Payne*, 706 S.W.2d 304 (Tex. 1986).

103. See, e.g., *Medtronic, Inc. v. Catalyst Research Corp.*, 664 F.2d 660 (8th Cir.), *aff'g* 518 F. Supp. 946 (D. Minn. 1981); *Seattle Totems Hockey Club v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982); *American Home Assurance Co. v. Insurance Corp. of Ireland*, 603 F. Supp. 636 (S.D.N.Y. 1984); *Cargill, Inc. v. Hartford Accid. & Indemn. Co.*, 531 F. Supp. 710 (D. Minn. 1982).

104. *Castanho v. Root & Brown*, [1981] A.C. 557 (H.L.). Coupled with the English doctrine of *forum non conveniens*, whereby a local action might be dismissed where doing so would place the action in a substantially more convenient court without unfair legal detriment to the plaintiff, the anti-suit injunction device effectively gave English courts the power to decide where international disputes should be litigated. The English doctrine of *forum non conveniens* was restated by the House of Lords in *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795 (H.L.), and more recently applied in *Spiliada Maritime Corp. v. Consulex Ltd.*, [1986] 3 W.L.R. 972, 985-86, [1986] 3 All E. R. 843, 854-55 (H.L.). See also *The Abidin Daver*, [1984] A.C. 398, 411-12 (Lord Diplock), 416 (Lord Keith); *The Atlantic Star*, [1974] A.C. 438, 454 (Lord Reid); *Metall und Rohstoff A.G. v. ACLI Metals (London) Ltd.*, [1984] 1 Lloyd's L. Rep. 598, 602 (C.A.).

Lords clarified the rule—*Castanho v. Root & Brown*<sup>105</sup>—illustrates its application. There, the plaintiff brought a personal injury action in Britain, the place of accident, against the British and Panamanian subsidiaries of a Texas company. While that suit was still pending (albeit with an admission of liability by the defendants), the plaintiff abandoned the British action and initiated essentially the same action in Texas, apparently on account of the much higher damages thought to be available in that forum. Upon application by the defendants, the British court issued an anti-suit injunction to the plaintiff respecting the American action, only to have its decision overruled by the Court of Appeal whose ruling in turn was upheld by the House of Lords. In the Lords' view, the prospect of higher damage awards in the United States was a legitimate advantage of which the plaintiff should not be deprived through issuance of a British anti-suit injunction. Though this view of damage levels has not been consistently followed,<sup>106</sup> *Castanho* remains the essential framework of analysis in British anti-suit injunction cases, at least in situations where parallel proceedings are or may be going on in two different jurisdictions.

The *Castanho* approach has since been called into question on account of changes in the English doctrine of forum non conveniens. The latest forum non conveniens cases require that consideration be given to a claim's "natural forum."<sup>107</sup> The "natural forum," in this context, means the forum "with which the action has the most real and substantial connection."<sup>108</sup> Thus, the English courts' willingness to decline jurisdiction on inconvenience grounds turns on whether England or some other jurisdiction is the claim's natural forum. The strong presumption in favor of the natural forum may, however, be overcome by the legitimate advantages that the chosen forum offers the plaintiff.<sup>109</sup> Translating the latest refinements in forum non conveniens doctrine into the anti-suit injunction context seems to yield the following results. First, whatever may be its opinion of the

---

105. [1981] A.C. 557 (H.L. 1980).

106. In *Smith, Kline & French Laboratories v. Bloch*, [1983] 1 W.L.R. 730, 738, [1983] 2 All E.R. 72, 78 (C.A. 1982), the Court of Appeal found the prospect of higher damages not to be a legitimate advantage. Lord Denning would not attach such significance to the damages aspect of the case. The other members of the court concluded that since an American court would apply a British measure of damages to the case, the American forum did not in fact present an advantage. For a still different view, see *Bank of Tokyo v. Karoon*, [1986] 3 W.L.R. 414, 422, [1986] 3 All E.R. 468, 477 (C.A.), in which Lord Ackner insisted that a feature of American legal practice (contingent fee representation) might cease to be a legitimate legal advantage if the proceedings themselves were vexatious.

107. *Spiliada Maritime Corp. v. Consulex Ltd.*, [1986] 3 W.L.R. 972, 987, [1986] 3 All E.R. 843, 856 (C.A.).

108. *Id.*

109. [1986] 3 W.L.R. at 991-93, [1986] 3 All E.R. at 859-61.

foreign forum, an English court will not entertain an application for an anti-suit injunction unless England is the claim's natural forum. However, even if this condition is satisfied, an injunction still will not issue if its effect would be to deprive the plaintiff unjustly of the advantages of the foreign forum.<sup>110</sup> Although the doctrinal modification may reduce the incidence of interjurisdictional anti-suit injunctions by English courts, the terms "natural forum" and "substantial justice" lend themselves to a wide range of interpretations and to correspondingly uncertain results. There is also a very substantial likelihood that British courts will not consider the cluster of plaintiff-friendly features associated with American civil procedure—ample discovery, attorneys' fees rules, contingent-fee representation, the civil jury trial, readier availability of punitive damages and higher damage levels generally—to be "just advantages" of the foreign forum.<sup>111</sup> In fact, it is precisely these procedural characteristics of American civil litigation that appear recently to have reawakened this form of injunctive activity on the part of British courts and that explain why American courts have been its standard target.<sup>112</sup>

Recent British cases thus reflect a conscious parallel between the standards governing defensive and offensive use of the *forum non conveniens* notion. In addition, British courts have lately shown an even greater distaste than American courts for the awkwardness of parallel proceedings.<sup>113</sup> The end result is a pronounced willingness on their

---

110. *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak* (June 1, 1987). In this case, the Privy Council (reviewing the Brunei courts' conclusion that Texas had become the natural forum) held that Brunei was the natural forum for a wrongful death action arising out of a helicopter crash in Brunei, where the decedent had his domicile and where the crash occurred, even though the helicopter was manufactured by a French company and operated by a Malaysian company under a contract with a Sarawak company. The Privy Council also found that parallel proceedings in Texas where the French manufacturer did business would prejudice the manufacturer because it would not be able to assert contribution claims there against the Malaysian and Sarawak parties. On these findings, the Privy Council felt justified in enjoining the parallel Texas action.

111. See, e.g., *Smith, Kline & French Laboratories v. Bloch*, [1983] 1 W.L.R. 730, [1983] 2 All E.R. 72 (C.A. 1982).

112. See Hartley, *supra* note 5, at 502-05, citing *Midland Bank v. Laker Airways*, [1986] 1 All E.R. 526, 536; *British Airways v. Laker Airways*, [1985] A.C. 58, 78; *Smith, Kline & French Laboratories Ltd. v. Bloch*, [1983] 1 W.L.R. 730, [1983] 2 All E.R. 72 (C.A.).

British courts have not always taken a consistently negative view of the procedural features of the American litigation cited. In one case, the Court of Appeal thought wider pre-trial discovery and availability of punitive damages in the United States a legitimate advantage to be offset against the expense and delay of a jury trial. When the plaintiff in the American action finally agreed to forego a jury trial, the balance tilted in favor of allowing the American action to proceed, and the anti-suit injunction entered by the British trial court was accordingly vacated. *Metall und Rohstoff A.G. v. ACLI Metals (London) Ltd.*, [1984] 1 Lloyd's L. Rep. 598 (C.A.).

113. The drawbacks of parallel litigation, according to Lord Diplock, include the added

part to decide for themselves whether the inconvenience of concurrent actions will be tolerated and, if not, to determine through a *forum non conveniens* dismissal or international anti-suit injunction whether it is the British or the overseas action that will survive.

#### 4. Anti-Suit Injunctions and Choice of Law

A further matter of importance is the question whether a court's willingness to restrain foreign judicial proceedings ought to be influenced by the difference in substantive law apt to be applied by the two competing fora, assuming the difference to be outcome-determinative under the circumstances. The analogous question has of course arisen in the context of dismissals for *forum non conveniens*. There the understanding is that a change in law adverse to the plaintiff should not of itself dissuade a court from dismissing a case on *forum non conveniens* grounds in otherwise appropriate circumstances.<sup>114</sup> In the *Cargill* case, Judge Murphy conceded that the English court would have applied English rather than American law to several important issues in the case, and that the former was distinctly more favorable to the plaintiff in the foreign action. He nevertheless issued the anti-suit injunction requested,<sup>115</sup> essentially on a finding that the convenience of litigation in his court outweighed the foreign plaintiff's partisan advantages in an English forum.

More difficult is the question whether the foreign proceedings should be restrained if the local court cannot or will not enforce a cause of action or underlying policy that the foreign court would normally enforce. The question becomes most troubling where convenience-based injunctions, rather than those based on forum public policy or prior obligations not to sue, are concerned. Where the local court cannot or will not enforce a foreign cause of action or underlying policy on account of its deep offense to the local forum, the situation is precisely one that may be appropriate for issuance of a public policy-based international anti-suit injunction.<sup>116</sup> Where the conduct of foreign litigation contravenes a prior obligation not to sue in that forum (or in any forum), the obligation should in principle be

---

expense and inconvenience, the race to judgment and the risk of inconsistent rulings. The *Abidin Daver*, [1984] A.C. 398; *Metall und Rohstoff A.G. v. ACLI Metals (London)*, [1984] 1 Lloyd's L. Rep. 598 (C.A.) For a comparison with older British views about the use of anti-suit injunctions to avoid parallel litigation, see Note, *Antisuit Injunctions*, *supra* note 5, at 1057-58, citing *Cohen v. Rothfield*, [1919] 1 K.B. 410, 413-14 (C.A. 1918) (Scrutton, L.J.).

114. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). According to the Supreme Court, the difference in applicable law actually deserves little weight in the overall *forum non conveniens* determination.

115. 531 F. Supp. at 714.

116. See notes 128-44 *infra* and accompanying text.

enforced according to its own terms. The absence of an alternative forum will be relevant or irrelevant accordingly.

In the case of convenience-based injunctions, however, a closer analysis is required. The question perhaps is better reformulated as follows. Ought a court be willing to enjoin foreign country proceedings on account of their vexatiousness or inconvenience when the claim being asserted in the foreign action cannot be brought anywhere else? Instinctively, the matter appears again quite analogous to the conventional forum non conveniens situation. Under *Piper*, the local court should not exercise jurisdiction in a case that it otherwise would dismiss on forum non conveniens grounds, simply because the law apt to be applied abroad is less favorable to the local plaintiff. But *Piper* does not discourage a court from considering on a forum non conveniens dismissal motion whether the foreign court would recognize and enforce the action's underlying claim. In fact, the minimal adequacy of the remedy in foreign court—alongside the defendant's submission to the jurisdiction of that court and the court's own willingness to hear the case—has been widely considered a precondition to forum non conveniens dismissal. Similarly, an American court should take a close look at its own remedial adequacy with respect to the cause of action whose pendency abroad is at issue, at least where the cause of action is not itself deeply offensive to forum public policy and its prosecution not contrary to a prior obligation on the plaintiff's part not to sue.

## 5. Conclusion

While use of the anti-suit injunction as an affirmative forum non conveniens tool is problematic in the sister-state context,<sup>117</sup> the case for using it in that fashion is somewhat stronger in the international cases. In the first place, most foreign country courts cannot be expected, consistent with their procedural traditions, to decline jurisdiction on discretionary grounds such as forum non conveniens and thus themselves police vexatious or oppressive litigation.<sup>118</sup> Moreover, all the inconvenience stakes—like distant travel, foreign law and language, costs, unfamiliar practices and procedures—are apt to be higher in the international cases. Nevertheless, the sister-state cases teach us that convenience-based anti-suit injunctions have a remarkable aptitude for multiplying and for breeding further friction in their

---

117. See notes 27-31 *supra* and accompanying text.

118. Forum non conveniens dismissal is not an accepted procedural convention outside the common law world, and is not even uniformly found there. R. Schlesinger, H. Baade, M. Damaska & P. Herzog, *Comparative Law: Cases, Text and Materials* 849 n.28 (5th ed. 1988).



wake. The regularity with which a change of forum in the international arena will mean a corresponding change in applicable law suggests only a heightened potential for conflict over the anti-suit injunction compared to the sister-state setting, without any obvious solution. Given the understandable sensitivities involved in assessing the advantages and inconveniences of foreign litigation, as well as the absence of any mechanism for containing the recriminations that are likely to flow from some of those assessments, courts should not deploy the anti-suit injunction as an affirmative international forum non conveniens device.

### *B. Obligation-Based Anti-Suit Injunctions*

In the situations discussed thus far, a court is faced with the decision whether, in light of the mix of public and private interest factors present, to prohibit a party before it from pursuing legal action abroad. In other cases, however, warrant to interfere with foreign judicial proceedings arises out of a more or less specific obligation by a party not to sue. An action may have been brought, for example, in apparent violation of a forum selection clause,<sup>119</sup> an arbitration clause<sup>120</sup> or a prior covenant not to sue.<sup>121</sup> Although the jurisdiction where the forbidden suit is pending would often be an entirely, if not the most, appropriate forum in which to raise the objection, it is not necessarily the only suitable forum for doing so.

The case of *Omnium Lyonnais d'Etanchéité et Revêtement Asphalte v. Dow Chemical Company*<sup>122</sup> provides a less conventional example of an obligation-based anti-suit injunction. There, a French national defending an action in federal district court obtained court-ordered discovery of material in connection with the litigation on condition that it preserve the confidentiality of that material and, more particularly, refrain from using it in any other legal proceeding here or abroad. When the French party then used the documents to launch a French legal action, the American court issued an injunction in effect restraining the foreign proceedings. The source of the prohibition was not some judicial appraisal of the overall conveniences and equities of foreign litigation, but rather a more or less specific prior

119. For an English example, see the *Tropaioforos* (No. 2), [1962] 1 Lloyd's Rep. 410.

120. For English examples, see *Tracom S.A. v. Sudan Oil Seeds Co.* (No. 2), [1983] 1 W.L.R. 1026, [1983] 3 All E.R. 140 (C.A.); *Pena Copper Mines v. Rio Tinto Co.*, [1911-13] All E.R. 209 (C.A.); *Ellerman Lines v. Read*, [1928] 2 K.B. 144 (C.A.).

121. E.g., *The Tropaioforos* (No.2), [1962] 1 Lloyd's Rep. 410. Analogously, a court might consider enjoining proceedings brought in a foreign country in violation of an arbitration clause. E.g., *Tracom S.A. v. Sudan Oil Seeds* (No. 2), [1983] 1 W.L.R. 1026, [1983] 3 All E.R. 140 (C.A.); *Pena Copper Mines v. Rio Tinto Co.*, [1911-1913] All E.R. 209 (C.A.).

122. 441 F. Supp. 1385 (C.D. Cal. 1977).

undertaking by the party not to bring the foreign action in the fashion it did.

Still other reasons, short of an express covenant not to sue or violation of a court order, may be imagined for treating a party as under a legally enforceable obligation not to sue, even in another forum. Under appropriate circumstances, equitable or promissory estoppel, waiver, and possibly even laches might justify a court having jurisdiction over a party in restraining it from initiating or continuing foreign legal proceedings. However, a distinction should be drawn between the case of a prior and independent obligation not to sue, on the one hand, and equity-based restrictions on exercise of the right to sue, on the other. As has been pointed out with respect to the former, there is simply no basis in conflict of laws for confining actions to enforce an obligation to perform (or not to perform) an act to the jurisdiction where that act ought to have been performed (or not performed).<sup>123</sup> Only considerations of sensitivity to foreign judiciaries—considerations that are essentially prudential in character—would justify a more restrictive attitude toward the proper venue for enforcement of an undertaking not to sue. By contrast, notions of estoppel, waiver, laches and the like are most appropriately deployed by the court in which the litigation is pending that for one of these reasons arguably ought to be deemed barred. This sort of defense by its nature—by which I do not mean merely its origins in equity—may best be assessed by the court that is chiefly concerned with the primary conduct in question (here, the act of litigation) and whether that conduct should be allowed. Estoppel, waiver and laches, after all, represent sources of restraint on the otherwise free exercise of a right, not independent obligations standing in the way. They are best appreciated contextually.

Yet another guise in which an obligation not to sue may surface is a tort-based claim not to conduct unreasonable or abusive litigation against someone owed a duty of care. Particularly in the civil law tradition, torts are often understood as simply one species of breach of a private law obligation, and the tort remedy as the corresponding mode of enforcing that species of obligation. Should a court, in a situation where the allegedly tortious conduct takes the form of litigation, refuse to entertain the claim on the ground that only the forum where that litigation is pending should be allowed to do so?<sup>124</sup> A distinction should be drawn between monetary claims sounding in tort

---

123. Messner, *The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 Minn. L. Rev. 494 (1929).

124. Judge Wilkey in *Laker* took the view that while prevention of duplicative litigation is generally not a sufficient reason for the issuance of anti-suit injunctions, the avoidance of

on account of damage due to foreign litigation and efforts through tort law-based reasoning to halt that litigation either at its threshold or midstream. As to the first, domestic malicious prosecution and abuse of process cases provide an analogy. Plaintiffs seeking damages on those grounds have simply not been required to press their claims in the jurisdiction where the allegedly malicious or abusive litigation occurred,<sup>125</sup> and there is no reason in logic (though there again may be reason in international comity) to reach a different result in situations of foreign country as opposed to sister-state litigation. On the other hand, any tort-based action for the prevention of future detriment would essentially amount to the convenience-based injunctive action discussed in the previous section, except that somewhat greater emphasis is apt to be given to the private interest factors, and somewhat less emphasis to the public interest factors, that together influence the "inconvenient forum" analysis.

Considering all the obligation-based postures in which the anti-suit injunction issue might arise, it is important to reaffirm a point made in connection with the convenience-based cases. Ideally, a court in which judicial proceedings have improperly been brought will itself decline to exercise jurisdiction, and perhaps that court should be given the privilege of doing so before foreign courts presume to intervene. Restraint, as the recent Restatement of Foreign Relations Law makes clear,<sup>126</sup> is always appropriate when courts issue injunctions to persons within their jurisdiction respecting conduct to be performed (or not performed) on foreign soil. An appropriate way of manifesting that restraint would be to permit a foreign court to prevent or correct its own errors. Thus, just as a court, before entertaining a motion for an anti-suit injunction, should allow a foreign forum to decline jurisdiction on its own (at least where that forum legally and practically recognizes *forum non conveniens* dismissal),<sup>127</sup> so it should also pursue ways of placing the movant's obligation-based arguments before the foreign court before definitively addressing them itself.

As a practical matter, a foreign court may be no more willing to decline jurisdiction on account of the plaintiff's apparent obligation not to sue than on account of another country's superiority as a

---

multiple suits brought solely for purposes of harassment would be a sufficient reason. *Laker Airways v. Pan Am. World Airways*, 731 F.2d 909, 928-29 (D.C. Cir. 1984)

125. 1 Am. Jur. 2d, *Abuse of Process* § 13 (1962); 52 Am. Jur. 2d, *Malicious Prosecution* § 13 (1970).

126. Restatement (Third) of Foreign Relations Law of the United States, § 431, comment d (1987).

127. See note 101 *supra* and accompanying text.

forum. The foreign court may not even be able, as a legal matter, to entertain the question. However, the unwillingness or inability of the foreign court to halt pending proceedings on account of a party's prior obligation not to have brought them should not prevent another court with a sufficient interest in the matter from taking appropriate action. Unlike the convenience-based claims to injunctive relief, these claims do not in principle reflect adversely on the fairness or reasonableness of the foreign court's exercise of jurisdiction or on its comparative advantages as a forum. Given their independent bases in prior commitments by the parties, such claims simply do not connote the intrusiveness and insult to foreign nations to which courts entertaining issuance of international anti-suit injunctions need to be alert. Besides being generally less inflammatory, they are also much fewer in number. Ultimately, then, the door should remain open for issuance of international anti-suit injunctions on obligation-based grounds.

### *C. Policy-Based Anti-Suit Injunctions*

Although public interest considerations sometimes enter into the kinds of cases discussed thus far, those situations tend chiefly to raise issues of convenience, fairness and duties to private parties, rather than public policy as such. In other situations, however, the public interest occupies or is said to occupy center stage. These policy-based cases constitute a third class of situations to which issuance of an anti-suit injunction may be an appropriate response.

The request for an anti-suit injunction in these cases rests essentially upon a claim that foreign litigation, whether pending or contemplated, would frustrate an important public policy of the local forum. Upon closer examination, it frequently turns out that what disturbs the court is not the offensiveness of the foreign cause of action as such, or of the likely outcome in a particular case, but rather the belief that the proceedings have as their purpose and will have as their probable effect interference with the local court's own prescriptive and adjudicatory jurisdiction.<sup>128</sup> The foreign court's very attempt to defeat the jurisdiction of the local court, however devoid of public interest the underlying cause of action in question may be, gives the situation a high public policy profile. The conflict is heightened when two jurisdictions share a strong interest in regulating a given transnational activity but seek to prescribe and enforce decidedly different policies respecting it.<sup>129</sup>

---

128. See generally Note, *Antisuit Injunctions*, *supra* note 5.

129. *Id.*

The forum may face several different scenarios. In the starkest of them, a foreign court may previously have issued an injunction restraining the local action in the belief that it had a vital and threatened interest in the outcome. If the forum nevertheless feels justified as a legal and prudential matter in proceeding, it also may choose to issue a counter-anti-suit injunction barring any further party requests for foreign court interference. Such an injunction has aptly been described as "jurisdiction-protecting" in nature.<sup>130</sup> In the American *Laker* litigation, for example, both Judges Greene and Wilkey in turn found the very purpose of the airlines' English action to be frustration of the American antitrust actions then underway, and thought issuance of a counter-anti-suit injunction an appropriate response.<sup>131</sup>

However, situations may arise in which a foreign court merely threatens to interfere in some procedural fashion with the local proceedings as, for example, by barring disclosure of documents or testimony by witnesses,<sup>132</sup> rather than seeking to "oust" the local court of jurisdiction (and therefore generating a self-protective response on the latter's part). More typically, the foreign court has simply taken jurisdiction over a matter in which the local court believes it has a superior and conflicting interest. That essentially was the view of the Massachusetts court in *Cole v. Cunningham*<sup>133</sup> upon enjoining the Massachusetts creditors from assigning their claims against the Massachusetts debtor to a New York party in an effort to secure a

---

130. Note, *Injunctions Against the Prosecution of Litigation Abroad*, *supra* note 5, at 156-57.

131. *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 929-31 (D.C. Cir. 1984). Judge Wilkey regarded the English action as "interdictory" in character and, on that account, the proper target of an American anti-suit injunction. For a sister-state example, see *James v. Grand Trunk W.R.R.*, 14 Ill. 2d 356, 152 N.E.2d 858, *cert. denied*, 358 U.S. 915 (1958).

132. *E.g.*, *Bank of Tokyo v. Karoon*, [1986] 3 W.L.R. 414, [1986] 3 All E.R. 468 (C.A.) (injunction issued barring depositor from pursuing New York action arising out of bank's disclosure of documents for use in the British litigation). *Cf.* *Garpeg Ltd. v. United States*, 583 F. Supp. 789 (S.D.N.Y. 1984) (denial of request by bank for anti-suit injunction requiring depositor to discontinue foreign proceedings for an order preventing disclosure of documents for use in American litigation).

Courts do not necessarily regard all unsolicited involvement of foreign courts in pending litigation as interferences worth enjoining. Where a party to an English action unilaterally sought judicial assistance from a United States district court in obtaining evidence for use in the litigation, the English court issued an injunction restraining any further recourse to the American court. Though upheld on appeal, the injunction was vacated by the House of Lords on the ground that a foreign court's assistance in evidence-gathering does not constitute a threat to forum jurisdiction. *South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.*, [1986] 3 W.L.R. 398, [1986] 3 All E.R. 487 (H.L.), *rev'g* [1985] 3 W.L.R. 739, [1985] 2 All E.R. 1046 (C.A.).

133. See note 46 *supra* and accompanying text.

preference that Massachusetts public policy disallowed. It was also the attitude of the English Court of Appeal in both the *Laker* and the *Midland Bank* cases toward the American antitrust claims in question. The warrant for a court to restrain foreign proceedings in cases like these clearly will vary according to the strength of the local jurisdiction's interest in precluding resolution of the dispute by the foreign court. This in turn will depend on the strength of the local jurisdiction's interest in the issue, the superiority of that interest over the foreign state's interest, and the degree of detriment to the former should the latter prevail. All of these considerations become folded into the "local public policy" analysis.

The decision in *Seattle Totems Hockey Club v. National Hockey League*<sup>134</sup> offers a case in point. There, the Seattle Totems Hockey Club had brought a private antitrust action in federal court against the National Hockey League (NHL), the owners of the Vancouver NHL team and others, seeking to have the parties' prior agreement declared void as in violation of American antitrust law. Shortly thereafter, the owners of the Vancouver team sued the Seattle Totems in Canada for damages for breach of that agreement. Particularly since the agreement had been made in Canada and contained a choice-of-law clause in favor of British Columbian law, the American court doubted that the Canadian court would apply United States antitrust law and an anti-suit injunction ensued. Although the court placed emphasis on the waste of private and public resources in the parallel proceedings, its chief concern seems to have been frustration of American antitrust policy.<sup>135</sup>

English courts<sup>136</sup> and writers<sup>137</sup> are fond of pointing out that, unlike the usual convenience-based injunction cases, in which courts generally compare the suitability of alternative fora,<sup>138</sup> the public policy cases often present a situation in which only one forum—the foreign court—is available for the cause of action in question. The net effect of an injunction in those circumstances, assuming it is obeyed, is to prevent the cause of action from being heard altogether. The *Mid-*

---

134. 652 F.2d 852 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

135. Hartley takes the view that British courts under similar circumstances would do likewise. Hartley, *supra* note 5, at 510 n.102. However, the most analogous actual case he could report was one in which a court took jurisdiction over a case, despite the parties' contractual selection of a foreign forum, where it believed mandatory British policy otherwise would go unenforced. *The Hollandia*, [1983] A.C. 565. For a comparable American decision, see *Union Ins. Soc. of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721 (4th Cir. 1981).

136. See, e.g., *Midland Bank plc v. Laker Airways Ltd.*, [1986] 1 All E.R. 526, 534 (C.A. 1985) (Dillon, L.J.).

137. See, e.g., Hartley, *supra* note 5, at 494.

138. See note 90 *supra* and accompanying text.

*land Bank* case again illustrates the situation. The English Court of Appeal there enjoined Laker from bringing the bank into the pending American antitrust action in the belief and indeed with the expectation that its antitrust claim against the bank would therefore not be heard at all.<sup>139</sup> The English courts are understandably cautioned not lightly to interfere with foreign judicial proceedings when the cause of action is incapable of being heard elsewhere.<sup>140</sup>

The traditional view expressed in the American cases is that courts will not consider issuing anti-suit injunctions unless in fact there are (or could be) parallel local and foreign actions between the same parties over the same claim.<sup>141</sup> In other words, an anti-suit injunction ought not issue if it would result in depriving the plaintiff of his or her only remedy.<sup>142</sup> As far as I can tell, American courts have not yet been tempted to interfere with foreign litigation in situations where the cause of action could not possibly be brought anywhere else. A plausible explanation for the rarity of such cases is in turn the rarity of foreign causes of action whose intrinsic qualities or patterns of enforcement our courts find objectionable. Whether the difference reflects greater restraint in the exercise of prescriptive jurisdiction by foreign courts and legislatures or a greater tolerance of unusual causes of action under foreign law on the part of American courts is an open question.

The issuance of international anti-suit injunctions for reasons of forum public policy is altogether much less common than academic treatments of the subject or the controversy surrounding it might lead one to believe. The particular celebrity of the *Laker* and *Midland Bank* litigations is due largely, though not only, to their representing just such a situation. Even *Laker*, however, must be read closely. It did not involve a claim that the antitrust policies of the United States are inherently offensive, but rather that their application to activities

---

139. The House of Lords in *Laker* previously had held that English courts lack jurisdiction to determine liability under American antitrust law.

140. See notes 136 and 137 *supra* and accompanying text.

141. *Stein Assoc. v. Heat & Control, Inc.*, 748 F.2d 653, 658 (Fed. Cir. 1984); *Medtronic, Inc. v. Catalyst Research Corp.*, 664 F.2d 660 (8th Cir.), *aff'g* 518 F. Supp. 946, 955 (D. Minn. 1981); *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577 (1st Cir. 1969); *Sperry Rand Corp. v. Sunbeam Corp.*, 285 F.2d 542 (7th Cir. 1960); *American Home Assurance Co. v. Insurance Corp. of Ireland*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789, 798 (S.D.N.Y. 1984); *Cargill, Inc. v. Hartford Accident & Indem. Co.*, 531 F. Supp. 710, 715 (D. Minn. 1982); *Western Elec. Co. v. Milgo Elec. Corp.*, 450 F. Supp. 835, 837 (S.D. Fla. 1978), *aff'd*, 568 F.2d 1203 (5th Cir. 1978).

142. The requirement of actual or potential concurrent proceedings mirrors *forum non conveniens* case law. It is well established that a competent court should not decline jurisdiction on grounds of inconvenience unless the more convenient forum is legally and practically available to the plaintiff.

allegedly conducted outside the United States would be so acutely extraterritorial as to offend foreign country sovereignty. Thus, for Britain, the extraterritorial application of American antitrust law itself raises a fundamental public policy question,<sup>143</sup> or, as the House of Lords put it, an "unconscionability" issue.<sup>144</sup>

In sum, American judges would do well to reserve the possibility—to be rarely exercised—of enjoining access of persons within their jurisdiction to the courts of another nation on fundamental policy grounds. Our courts already exercise the right to deny recognition or enforcement to foreign country judgments in the name of forum public policy, even though the Full Faith and Credit Clause allows no such excuse for discrediting sister-state judgments.<sup>145</sup> Of course, non-recognition of judgments does much less violence to principles of international comity than actual interference in foreign judicial proceedings. But that only suggests that the latter step be taken with even greater caution, deeper reluctance and more extreme rarity than already attend the former.

## VII. CONCLUSION

A number of conclusions emerge with reasonable clarity from this inquiry into the international anti-suit injunction. First, the instrument is becoming an established, if still not very common, judicial tool in the Anglo-American world. Second, use of this instrument in the United States rests upon a history of sister-state interjurisdictional injunctions that, contrary to its apparent disharmony with the Full Faith and Credit Clause, is much older and richer than might be assumed. The most striking feature of American practice in this regard is the frequency with which the instrument is deployed as an offensive *lis pendens* or *forum non conveniens* tool.

The international anti-suit injunction cases in particular entail a very striking tension. On the one hand, the stated reasons for issuance of anti-suit injunctions in domestic cases are apt to be even more

---

143. *Midland Bank v. Laker Airways*, [1986] 1 All E.R. 526. It is possible that exorbitant exercises of jurisdiction to adjudicate, like exorbitant exercises of prescriptive jurisdiction, would trigger the issuance of anti-suit injunctions where deemed necessary to protect a party from "unconscionable" litigation abroad.

144. Even while vacating the anti-suit injunction issued by the English Court of Appeal in *Laker*, the House of Lords made it quite clear that relief of that sort might be proper under other facts. And of course it was in the wake of the Lords' ruling that the Court of Appeal later issued an order protecting *Midland Bank* from suit by *Laker* in the United States as necessary to prevent the "unconscionable" prosecution of an English national in American court through the extraterritorial application of United States antitrust law. See note 18 *supra* and accompanying text.

145. See note 73 *supra* and accompanying text.



powerful when applied to judicial restraints on foreign country proceedings. On the other hand, resort by American courts to anti-suit injunctions in such situations runs deeply counter to the impulses of mutual consideration and comity that the courts are urged to follow in international cases. As between these two forces, a policy of extreme caution in resort to anti-suit injunctions will probably prevail in the international setting, and applications for such relief will probably meet a correspondingly hostile reception. Nevertheless, in order to promote a more discriminating judicial attitude toward the international anti-suit injunction it is important to distinguish among the categories of uses for which the remedy is sought and the objectives that would thereby be served.

Any effort at classification of grounds for injunctive relief is necessarily tentative. Apart from limitations inherent in the typology itself, judicial policy on so highly charged a matter ought to be informed not only by abstract principles or reasoning, but by experience and by attention to the particularities of each case. Unfortunately (for purposes of policy formulation, though not for purposes of international relations), experience with the international anti-suit injunction is still relatively thin. Although there are signs of stirring in certain civil law countries,<sup>146</sup> the precise remedy in question seems to be confined for the moment to the common law world, in particular the United Kingdom, Canada<sup>147</sup> and the United States.<sup>148</sup>

American courts rightly reserve the possibility of issuing an international anti-suit injunction when they understand the central purpose and effect of a foreign litigation to be frustration of an important public policy of the United States. Assuming that such a policy may, consistent with jurisdictional principles of international law, be applied to the case in question, the United States has a legitimate interest in seeing that its effectuation is not thwarted by the preemptive action of a foreign court. The federal courts in *Laker*, for example, justifiably issued anti-suit injunctions to various European entities they had good reason to suppose were about to institute actions whose avowed object was to neutralize *Laker's* rights under American anti-trust law.

Even where the foreign litigation does not set as its purpose the frustration of American law or policy, it may be deemed so offensive to American public policy or so contrary to legitimate American

---

146. Westin & Chrocziel, *Provisional Relief in International Litigation: A View from Germany*, 28 Colum. J. Transnat'l L. 723 (1990).

147. See Black, *The Antisuit Injunction Comes to Canada*, 13 Queen's L. J. 103 (1988).

148. The Reporters' note to the latest Restatement provision on the international anti-suit injunction cites only the *Laker* case.

interests as to invite the same response. Absent a Full Faith and Credit bond with foreign country judiciaries, and more importantly a guarantee of public values shared with the polities of which they are part, the possibility must remain open for American courts to restrain persons within their jurisdiction from invoking foreign judicial process. Needless to emphasize, American courts should exercise extreme caution before traveling this particular avenue. It is altogether too easy to suppose that any foreign cause of action that our courts would refuse to entertain as a matter of forum public policy, or any judgment to which our courts would deny recognition or enforcement on similar grounds, is one in whose proceedings abroad our courts have a right upon proper application to interfere. Unfortunately, language in Judge Wilkey's opinion for the Court of Appeals in *Laker* lends support to that belief.<sup>149</sup> It would be highly destructive of world public order if national courts acted upon an asserted freedom to impede foreign judicial proceedings, whether underway or purely contemplated, on the simple ground that they find them objectionable, even fundamentally so. When acting on international public policy grounds, American courts as a rule should confine themselves to decisions about their own procedures and policies—be they matters of jurisdiction, choice of law or recognition and enforcement of foreign judgments—unless persuaded either that the defeat of American law is the foreign proceeding's very purpose or that vital American interests are otherwise in jeopardy. In effect, courts should respect the distinction between offensive and defensive use, not only of the more or less technical instruments of *lis pendens* and *forum non conveniens*, but also of the forum public policy notion itself.

The request for an anti-suit injunction generally raises very different considerations when based upon a prior and independent obligation of a party not to bring suit in the foreign jurisdiction (or perhaps anywhere at all). Provided all the requisites of an injunctive action are present (including personal jurisdiction over the defendant), the institution or continuation of judicial proceedings should be viewed presumptively as a form of conduct capable of being enjoined by an American court if done in breach of obligation, albeit outside the territory of the enjoining court. International comity admittedly counsels that the court before which the challenged proceedings are pending itself be given an opportunity to consider and enforce the alleged obligation not to sue before a foreign court presumes to do so. More fundamentally, since the injunction is an equitable remedy, its

---

149. *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931-33 (D.C. Cir. 1984).

use in any event lies within the sound discretion of the court, and both the nature and the extraterritoriality of the conduct (here overseas litigation) may counsel judicial restraint. Nevertheless, if a person's undertaking not to sue (or not to sue in a particular forum) constitutes an obligation that is legally enforceable, and legally enforceable in an American court, an international anti-suit injunction should not be completely ruled out.

Turning finally to the anti-suit injunction based on claims of inconvenience, vexatiousness or oppression, we encounter the international anti-suit injunction in perhaps its own most vexing form. I have advanced several reasons for refraining from what I have called offensive use of the forum non conveniens doctrine. First, unlike the obligation-based cases, in which the foreign plaintiff's legal entitlement to sue is brought into issue, the convenience-based cases in effect challenge the fairness and reasonableness of the foreign court's assertion of jurisdiction (in a case, moreover, in which the foreign court presumably had at least some basis for asserting jurisdiction in the first place). Such a challenge is inherently offensive to foreign countries. While affirmative use of the forum non conveniens doctrine may be especially tempting in relation to those many legal systems around the world that do not allow their courts a forum non conveniens escape from jurisdiction,<sup>150</sup> the fact remains that it is not for our courts in effect to impose one on them.

Second, unlike the obligation-based and public policy-based anti-suit injunctions, those injunctions based on assessments of comparative fairness and convenience are potentially limitless in number. Not every international lawsuit deeply implicates our own public policy mandates or offends some prior and independent obligation not to sue. But virtually every international case is a candidate for parallel proceedings, as well as forum non conveniens treatment, as evidenced by the regularity with which defensive forum non conveniens motions are interposed in international litigation. As long as the doctrine remains a defensive one, the pattern can perhaps be tolerated. Should offensive use of the doctrine become similarly routine, however, the prospect is one of daily international judicial warfare of which the *Laker* and *Midland* cases only gave us a passing glimpse.

Third, offensive use of the forum non conveniens doctrine will multiply vastly the number of occasions upon which courts must decide how much weight to give to differences in substantive law and in remedial adequacy when making assessments of comparative convenience, and will aggravate the climate in which those decisions are

---

150. See note 100 *supra* and accompanying text.

made. The Supreme Court's *Piper* decision did not adequately resolve the problem of choice of law in the forum non conveniens dismissal setting, and it is questionable another adequate solution exists. It is difficult to believe that the problem will prove any more tractable when it surfaces, as it inevitably must, in convenience-based anti-suit injunction cases.

Fourth, the possibility is not to be overlooked that a state's resort to international anti-suit injunctions on grounds of inconvenience or vexatiousness will be met with a reaction in kind by other states. Significantly, the courts of Great Britain—the foreign jurisdiction showing greatest relish for this form of relief—have directed that remedy chiefly against United States litigation, and the features of that litigation that have contributed to its targeting are likely to continue into the future. These features include high damage award levels (including noncompensatory damages), litigation costs and the American rule on attorneys' fees, delays associated with the civil jury trial and other aspects of American litigation, and of course extensive pretrial discovery—the latter being widely viewed abroad as in itself an instrument of oppression. That these features are not always identified as such by foreign courts as factors of inconvenience and oppression scarcely means that they are not so considered.

Against these costs must be measured the costs of permitting litigants to pursue judicial remedies in fora that, under the circumstances, appear to have been chosen in whole or in part for their capacity to inconvenience and otherwise disfavor the defendant, or to duplicate the expenditure of resources. Although the costs of parallel proceedings and even the deliberate selection of manifestly inconvenient foreign fora are evils, they are not as evil as the remedy proposed for their cure, even assuming such a cure would be effective. They are certainly a great deal less evil than the pattern of interjurisdictional judicial warfare that their cure has the potential to launch. Accordingly, American courts should not only confine the issuance of international anti-suit injunctions to specific cases where the need for such relief is truly urgent and compelling, but also confine relief to those categories of cases that will allow the remedy to remain within manageable and internationally acceptable bounds.